88-1418

FEB 21 1989

No. __-___

IN THE

Supreme Court of the United States

October Term, 1988

RAYMARK INDUSTRIES, INC.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Federal Circuit

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February 17, 1989

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Questions Presented for Review

(1) Where substantial evidence was presented of a special relationship between the United States and Raymark Industries, Inc., a company that supplied asbestos cloth to a United States naval shipyard in conformity with United States government regulations and specifications, did the court below err in determining that Raymark failed to state a claim for indemnity and/or contribution against the United States under the Federal Tort Claims Act?

(2) Did the court below err in dismissing Raymark's claims for contribution and/or indemnity against the United States under the Federal Tort Claims Act and the Longshore and Harbor Workers' Compensation Act?

(3) Did the court below err in dismissing Raymark's claims for contribution and/or indemnity against the United States under the Tucker Act where the United States had superior knowledge to Raymark regarding the potential hazards of asbestos inhalation?

Parties to This Proceeding

The petitioner is Raymark Industries, Inc. f/k/a Raybestos-Manhattan.

Eagle-Picher Industries, Inc. will likely file its own Petition for Writ of Certiorari in this case.

The respondent is the United States of America.

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A. OPINIONS OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is attached hereto as Appendix 1 and was reported as Lopez v. A.C. & S., Inc., 858 F.2d 712 (Fed. Cir. 1988).

The opinion of the United States Court of Appeals for the Federal Circuit on rehearing is attached hereto as Appendix 2 and was not reported.

B. STATEMENT OF JURISDICTIONAL GROUNDS

(1) Date of Judgment.

The judgment of the United States Court of Appeals for the Federal Circuit was rendered on September 29, 1988.

(2) Date of Order on Rehearing.

A timely motion for rehearing was filed by Eagle-Picher Industries, Inc. and was denied on November 18, 1988.

(3) Statutory Provision.

This court has jurisdiction under 28 U.S.C. § 1254(1).

C. STATUTES AT ISSUE IN THE CASE

28 U.S.C. § 1346(a)(2)

28 U.S.C. § 1346(b)

28 U.S.C. § 2674

33 U.S.C. § 902(3)

33 U.S.C. § 902(21)

33 U.S.C. § 905(b)

RCW 51.04.010

D. STATEMENT OF THE CASE

This case was initially brought in the United States District Court for the Western District of Washington at Seattle, Cause No. C84-155M. The plaintiff, Albert Lopez, filed an action against numerous defendants, all of which were manufacturers and suppliers of asbestos containing insulation products used to repair United States naval vessels at Puget Sound Naval

Shipyards in Bremerton, Washington. Mr. Lopez was a civilian pipe fitter and pipe coverer who was employed by the United States Navy at Puget Sound Naval Shipyards.

Raymark Industries, Inc. f/k/a Raybestos-Manhattan ("Raymark") was one of several suppliers of asbestos containing insulation products to Puget Sound Naval Shipyards. Prior to trial, Raymark settled Mr. Lopez's claim by payment of $7,200 to Mr. Lopez.

Raymark, along with Eagle-Picher Industries, Inc. ("Eagle-Picher") joined the United States as a third-party defendant in the case and sought contribution and/or indemnity from the United States on the basis of the Tucker Act, 28 U.S.C. § 1346(a)(2), the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2674, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) and Washington state law

supporting a claim of liability against the United States based on the special relationship between the United States and Raymark.

Raymark's claim for contribution and/or indemnity is based on the fact that the United States had a special relationship with Raymark. The United States was more than the mere purchaser of asbestos-containing insulation products as stated in the Court of Appeals unsupported findings. During the Second World War and thereafter, the United States promulgated the government contracts which specified the use of asbestos in the insulation products sold to the United States. The specifications were not performance specifications as the Court of Appeals stated but were in fact design specifications. The United States stockpiled asbestos to support the war effort and was the supplier of the raw asbestos

used by Raymark in manufacturing the asbestos containing products which were eventually sold to the United States. The United States was also the owner of the shipyard where Mr. Lopez was employed and to which Raymark delivered the asbestos containing products. The United States was Mr. Lopez's employer. The United States was the owner and operator of the naval vessels on which Mr. Lopez worked and on which Raymark's insulation products were ultimately installed.

The United States moved for summary judgment of dismissal of the third party action. As set forth in the Federal Circuit's opinion, the district court granted the motion for summary judgment and the Federal Circuit affirmed the dismissal. The motion for rehearing brought by Eagle-Picher was also denied by the Federal Circuit.

The significance of this case is much greater in scope than the $7,200 paid by Raymark to Mr. Lopez. Raymark urges this Court to accept review of this case because of its precedential value in most of the asbestos injury cases pending in the United States. At present there are thousands of cases pending in the United States representing millions of dollars in claims. Of those claims, a large percentage are claims made by shipyard workers employed by the United States and who worked on United States naval vessels.

In the cases brought by these thousands of plaintiffs, the defendants are all of the manufacturers of asbestos-containing insulation products. Of the defendants, some have filed for bankruptcy protection (for example, Johns-Manville and GAF Corporation) while others have attempted to weather the onslaught of cases with insur-

ance, massive attorneys' fees, and millions of dollars paid in settlement and judgments.

Throughout the course of the asbestos litigation in the United States, there is one entity which more than any other entity was inextricably involved with the asbestos problem and is yet almost entirely absent from the litigation. That entity is, of course, the United States.

In addition to the other factors outlined above which describe the special relationship between the United States and Raymark, the United States possessed the most knowledge of any entity or person, including Raymark, about the hazards associated with long-term exposure to asbestos through inhaling asbestos fibers contained in insulation products. By the late 1930s, the United States was already aware of the health hazards associated with the use of

asbestos in shipyards. Raymark was never informed about this special knowledge. The annual report of the Surgeon General of the United States Navy (1939) studied health hazards in the various naval shipyards, including Puget Sound Naval Shipyards. Among the Surgeon General's findings:

> Hazard of Asbestosis: Asbestosis is an industrial disease incident to the inhalation of asbestos especially for prolonged periods, and is distinct from silicosis. The development of the disease depends upon the concentration of the dust, the size of the dust particles and the length of exposure. The workers in the Pipe Covering and Insulation Shop are exposed to the inhalation of asbestos dust . . .
>
> The medical survey of the 11 employees in this Shop was conducted recently with the object of ascertaining whether asbestosis in any stage could be detected . . . However, it was not considered that the negative findings precluded the future development of asbestosis by continued exposure to present occupational conditions.

In December 1942, a "Meeting in Regard to Minimum Requirements for Industrial Health and Safety in Shipyards" was held in Chicago, Illinois before the United States Maritime Commission. At this meeting, the chairman, Dr. Philip Drinker, a United States Public Health Service employee and one of the most respected leaders in the field of industrial health stated:

> The asbestosis is caused in connection with the handling of asbestos. That is not unlike silicosis in its effects, and we rather expect it to occur in the shipyards, because we have seen asbestos being handled in installation work with little or no precautions.

In 1943, the United States Navy approved, as a result of the above referenced Chicago meeting, the "Minimum Requirements for Safety in Industrial Health and Contract Shipyards." The minimum requirements set forth standards to monitor asbestos dust, screen employees, and provide safety

instruction and equipment. These standards were never implemented. Once again, it must be emphasized that all of this information was never transmitted by the United States to the manufacturers of asbestos-containing insulation products like Raymark.

Dr. Ray Kardong, who founded the Puget Sound Naval Shipyard's Industrial Hygiene Department in 1942, confirmed the United States Navy's early awareness of a potential asbestos-related health hazard at Puget Sound Naval Shipyard. Dr. Kardong's testimony established that at least by 1942 the United States recognized the serious health hazard posed by inhalation of dust from asbestos-containing products and that respirators, annual medical exams and x-rays, and monitoring of shipyard asbestos dust levels should have been performed by the United States.

In 1944, Dr. W. C. Dreesen and W.S. Fleischer completed a study and report entitled "U.S. Navy-U.S. Maritime Commission; Report on Investigation of Asbestosis from Amosite Pipe Covering at Bath Iron Works." The Bath Iron Works study was one of several documents which was marked "classified" and not transmitted to Raymark and other asbestos product manufacturers, revealed the rate of asbestosis in the pipe covering shop of nearly 16% and a rate of abnormal x-ray findings of 30%. Dust levels were 59 parts per cubic foot or ten times the threshold limit value set by the American Conference of Industrial Hygienists in 1946 and adopted by the United States Navy's Bureau of Medicine in 1955. The Bath Iron Works study recognized that the conditions in the pipe covering shop presented a very real asbestosis hazard. The study again recommended adequate ven-

tilation, a requirement that all employees handling asbestos wear suitable respirators, and a program of medical surveillance involving periodic x-rays and examinations.

Despite all of these warnings, the United States failed to pass on this knowledge to Raymark. More tragically, the United States failed to enforce its own safety regulations at Puget Sound Naval Shipyard. Mr. Lopez, who started work at Puget Sound Naval Shipyard in 1947, testified that his employer (the United States) failed to instruct him about the possible health dangers associated with his trade until the mid-1960s. Thus, the remedies established in the early 1940s by the United States were ignored by the United States for a period of over twenty years. His testimony indicated that it became mandatory to wear a respirator in 1967 or 1968. Also, the instructions from his

employers as to the safety precautions to be followed while handling asbestos were not given until the mid-1960s. With respect to collecting dust samples, Mr. Lopez testified that the first time he actually saw such dust samples being taken was in the late 1960s.

As early as 1939, but no later than 1942, the United States was certainly aware that its policy of mandatory use of asbestos-containing products in its shipyards posed a serious potential health hazard to its shipyard employees. By then the United States was aware of and had in fact set up safety measures to protect its employees against this hazard. However, instead of implementing and enforcing those safety measures, the United States continued to require the use of asbestos pursuant to mandatory government specifications and

continued to take no steps to protect the health of their shipyard workers.

Finally, despite the superior knowledge of the United States, the potential health hazards were not disclosed and the results of the tests were classified and not revealed to Raymark.

E. ARGUMENT

(1) The Federal Circuit Acted Contrary to Established Washington Law in Finding that a Federal Tort Claims Act Cause of Action Was Not Stated by Raymark Based on the Special Relationship Doctrine.

The parties agree that the liability of the United States under the Federal Tort Claims Act ("FTCA") is governed by "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). In its analysis of the application of Washington state law to the FTCA, the Federal Circuit erroneously found that Washington law would provide no basis for a cause of action

against the United States by Raymark. The United States should be liable to Raymark for contribution and indemnity to the extent a "private individual under like circumstances" would be liable. 28 U.S.C. § 2674; Wright v. United States, 719 F.2d 1032, 1034 (9th Cir. 1983).

The United States breached an independent duty to Raymark created by the special relationship between the United States and Raymark. The Court of Appeals, contrary to the pronouncements of the Washington Supreme Court, found that absent any express contract, the United States, as Mr. Lopez's employer, was not liable to indemnify third parties such as Raymark who are obliged to pay damages to Mr. Lopez. There is no requirement under Washington law that an express contract must exist in order for there to be liability on the part of the employer. Due to the terms of Wash-

ington's Industrial Insurance Act, RCW 51.04.010, it is a rare case for which the employer will be found liable to the employee. However, such liability can be had without an express contract. The Washington Supreme Court in Glass v. Stahl Specialty Co., 97 Wn.2d 880, 885, 652 P.2d 948 (1982), supports the notion that a third party can maintain an action against an employer if that employer voluntarily assumed an independent duty or obligation to that third party. See also, Seattle-First National Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 242, 580 P.2d 1308 (1978). The Washington Court of Appeals has held that a third party action against an employer was permissible if there was an express contract, independent duty, or vicarious liability. Olch v. Pacific Press & Shear Co., 19 Wn. App. 89, 93, 573 P.2d 1355, rev. denied, 90 Wn.2d 1017 (1978).

> It has been noted, however, that when an independent duty or obligation is owed by the employer to a third party the exclusivity provisions of the workmen's compensation act will not bar recovery by the third party.

Id. at 92-93. Here, the independent duty was created by the special relationship between the United States and Raymark and cannot be so easily dismissed. The Federal Circuit characterized Raymark's argument as requiring the "buyer" to tell them (Raymark) that their product was defective, intrinsically or as actually used. Lopez v. A. C. & S., Inc., 858 F.2d at 717. The Court of Appeals opinion further states that Raymark's argument does not deal with how the United States was supposed to know that the supplier of asbestos needed any information about asbestos that it did not have. Id. Contrary to the Federal Circuit's approach to this case, the United States was not simply the "buyer" of Ray-

mark's products. The United States was much more, and to state that the United States was simply the buyer flies in the face of all the evidence before the courts below.

The Federal Court's failure to find an FTCA cause of action under Washington's doctrine of special relationship liability provides a sufficient basis on which to grant Raymark's petition for writ of certiorari under Sup. Ct. R. 17.1(a)-(b).

(2) The Court Below Acted Contrary to United States Supreme Court Case Law and in Finding that Mr. Lopez's Claim Must Be Recognized under Federal Admiralty Law in Order for Raymark to Prevail under the Federal Tort Claims Act and the Longshore and Harbor Workers' Compensation Act.

The Federal Circuit erred in finding that admiralty jurisdiction was required in order for Raymark to pursue indemnity against the United States under the FTCA and Lockheed Aircraft Corp. v. United

States, 460 U.S. 190, 103 S. Ct. 1033, 74 L. Ed. 2d 190 (1983). While there is no doubt that the Ninth Circuit rejected an asbestos worker's claim of admiralty jurisdiction in the case of Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984), that finding is not crucial to the issues before this Court. The relevant portion of the Longshore Harbor Workers Compensation Act ("LHWCA") states as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly. . . .

33 U.S.C. § 905(b). The United States, as vessel owner of the military ships on which Mr. Lopez worked, is the "vessel" against

which Raymark is entitled to bring suit. See 33 U.S.C. § 902(21). If, under the LHWCA, a third party claim could be brought against a private vessel owner, then the same claim could be brought against the United States. The key question is whether under the LHWCA Mr. Lopez is a covered employee. The definition of employee under the LHWCA is as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations and any other harbor-worker including a ship repairman, ship builder, and ship-breaker . . .

33 U.S.C. § 902(3). Mr. Lopez was such an employee even if his claim was not cognizable as a federal admiralty claim. The United States Supreme Court has stated:

> We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3) and he is covered under the LHWCA, providing, of course,

> that he is the employee of a statutory "employer," and is not excluded by any other provision of the Act. We consider these employees to be "engaged in maritime employment" not simply because they are injured in the historically maritime locale, but because they are required to perform their employment duties upon navigable waters.

Director, Office of Workers' Compensation Programs, United States Dept. of Labor v. Perini North River Assocs., 459 U.S. 297, 324, 103 S. Ct. 634, 74 L. Ed. 2d 465(1983). This Court rejected the notion that LHWCA liability is premised on admiralty jurisdiction which requires satisfaction of the traditional maritime nexus as set forth in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972). The Supreme Court stated:

> There is nothing in these comments, or anywhere else in the legislative Reports, to suggest, as Perini claims, that Congress intended the status language to require that an employee injured

> upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered. Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered.

459 U.S. at 318-19. In Perini, the Court specifically referred to the Executive Jet case, and stated that reliance on that case to limit the scope of the LHWCA is unfounded.

> Perini cites our decision in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed.2d 454 (1972), and argues that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. Perini's reliance on Executive Jet is misplaced. In that case, the only issue before the court was whether federal admiralty jurisdiction extended to tort claims arising out a crash of an airplane into navigable waters on a flight "within the continental United States, which [is] principally over land." . . .

> The explicit language of Executive Jet makes it clear that our discussion was occasioned by the "problems involved in applying a locality-alone test of admiralty tort jurisdiction to the crashes of aircraft" in a situation where "the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous." . . . In addition, Churchill [the claimant in Perini], as a marine construction worker, was by no means "fortuitously" on the water when he was injured.

459 U.S. at 320, n.29. Because Mr. Lopez's injury occurred during the course of his employment on navigable waters, the maritime employment requirement of 33 U.S.C. § 902(3) is satisfied and the court below should not have dismissed Raymark's claim for indemnity and contribution based on vessel owner liability set forth in the LHWCA. 33 U.S.C. § 905(b). The Federal Circuit did not cite the Perini case and its finding is directly contrary to the holding of the United States Supreme Court

in the Perini case; thereby providing a basis on which to grant Raymark's petition for writ of certiorari under Sup. Ct. R. 17.1(c).

(3) The Federal Circuit Acted Contrary to Established Federal Common Law in Finding That a Tucker Act Claim was Not Stated by Raymark Based on the Superior Knowledge Doctrine.

Under the Tucker Act, 28 U.S.C. § 1346(a)(2), the court below recognized the availability of a claim under the doctrine of superior knowledge. Yet, within the framework of the special relationship between Raymark and the United States, it is inconceivable how the Federal Circuit could have dismissed Raymark's claim as to superior knowledge with an unsupported presumption:

> We must presume that government officials acted in good faith, the contrary not being alleged. Acting in good faith they could not have knowingly exposed their own employees to undue asbestos hazards. Maybe they had a duty to know more than they did, e.g.,

> to follow up clues to danger they actually had received. Raymark and Eagle-Picher have asserted then, not only the duty of a customer to inform the supplier that his product is defective, but a duty to find out what he does not already know.

Lopez v. A. C. & S., Inc., 858 F.2d at 717-18. That is precisely the claim made by Raymark. Not only was the United States the owner of the vessels being repaired, the owner of the shipyard, the employer of Mr. Lopez, the purchaser of asbestos products, the stockpiler and supplier of raw asbestos, the promulgator of the specifications for asbestos containing products, but the United States also had superior knowledge as to the hazards of asbestos inhalation and did not reveal that knowledge to Raymark nor did it enforce its own safety standards in order to provide Mr. Lopez with a safe place to work. There is no basis on which to presume that

government officials acted in good faith. In fact, the contrary was alleged. The Federal Circuit, in reviewing a case resolved on a Fed. R. Civ. P. 12(b)(6) motion, has inexplicably presumed that the facts asserted by the moving party (the United States) are true, contrary to the accepted view that the court must accept the facts of the non-moving party (Raymark) as true. See Church of Scientology of California v. Flynn, 744 F.2d 694, 696 (9th Cir. 1984).

Based on the evidence before the courts below, it is clear that the United States did knowingly expose their own employees to undue asbestos hazards. In fact, the United States waited twenty years before implementing and enforcing their own safety regulations.

The court below correctly cited the case of American Ship Building Co. v.

United States, 654 F.2d 75 (Ct. Cl. 1981), to set out the standards for a superior knowledge claim by Raymark.

> The doctrine of superior knowledge is generally applied to situations where (1) the contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specifications supplied misled the contract, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

Id. at 79. Yet, the Court below presumed certain unsupported facts and found the doctrine unavailable to Raymark. The Federal Circuit even stated that Raymark claimed that the United States had a duty not only to inform Raymark of its product's deficiencies but to find out what Raymark did not already know. Yet Raymark does not and has never urged the Court to impose such a duty on the United States. Raymark

simply asks that the Court find that under the circumstances, the United States should have revealed the knowledge it already had regarding asbestos exposure. This superior knowledge gained from years of testing of shipyard employees who worked with asbestos containing insulation products was withheld from Raymark under the guise of "classified information" and the use of laws such as the Espionage Act, 50 U.S.C. §§ 31-32, which imposed criminal penalties if anyone were to reveal the contents of the studies to unauthorized persons. By classifying the documents, the United States must have known that Raymark did not have the knowledge that it had regarding the hazards of asbestos.

With respect to the contract specifications themselves, the part of the specifications which misled Raymark was the specification calling for asbestos to be

included in the product without providing Raymark with information regarding the health risks associated with inhalation of asbestos fibers. Using the Federal Circuit's rationale, it was safe for Raymark to presume the government was acting in good faith by demanding asbestos, supplying the asbestos, and therefore, Raymark was not put on notice to make inquiry into the safety of shipyard employees using asbestos products. This presumption was, of course, wrong. However, the United States already knew that the use of asbestos was harmful but did not reveal that information to Raymark.

Failure by the court below to find a valid Tucker Act claim by Raymark under the superior knowledge doctrine is contrary to prior federal appellate decisions and is sufficient grounds under Sup. Ct. R.

17.1(a), (c) for this Court to grant Raymark's petition for writ of certiorari.

F. CONCLUSION

Based on the foregoing as well as those grounds set forth by Eagle-Picher in its petition for writ of certiorari (which Raymark hereby joins), Raymark requests that this Court grant its petition for writ of certiorari.

Respectfully submitted this 15th day of February, 1989.

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APPENDIX 1

United States Court of Appeals for the Federal Circuit

87-1543 and 87-1544

ALBERT LOPEZ and SHIRLEY LOPEZ,
Plaintiffs,

and

RAYMARK INDUSTRIES, INC. and EAGLE-PICHER INDUSTRIES, INC.,

Defendants/Third-Party-
Plaintiffs/Appellants,

v.

A. C. & S., INC.; AMERICAN ASBESTOS TEXTILE CORP., a/k/a AMATEX CORP.; ARMSTRONG CORK, INC.; ASARCO, INC.; CAREY CANADA, INC.; THE CELOTEX CORP., successor in interest to PHILIP CAREY MANUFACTURING CO., PHILIP CAREY CORP., BRIGGS MANUFACTURING CO., and PANACON CORP.; COMBUSTION ENGINEERING INC.; CROWN CORK & SEAL CO.; FIBREBOARD CORP.; THE FLINTKOTE CO.; FORTY-EIGHTY INSULATION, INC.; GAF CORP., successor by merger with RUBEROID CO.; GARLOCK INC., JOHNS-MANVILLE SALES CORP.; J.P. STEVENS, INC.; KEENE CORP., successor by merger with BALDWIN-EHERT-HILL a/k/a ASTEN HILL; NICOLET INDUSTRIES; OWEN-CORNING FIBERGLAS CORP.; OWENS-ILLINOIS CORP.; OWENS ILLINOIS GLASS; PITTSBURGH CORNING CORP.; RAYBESTOS-MANHATTAN; SOUTHERN TEXTILE; STANDARD ASBESTOS; UNION ASBESTOS; RUBBER CO. a/k/a UNARCO INDUSTRIES, INC.,

Defendants,

v.

UNITED STATES OF AMERICA,

Third-Party-Defendant/
Appellee.

United States Court of Appeals for the Federal Circuit

87-1543 and 87-1544

ALBERT LOPEZ and SHIRLEY LOPEZ,

Plaintiffs,

and

RAYMARK INDUSTRIES, INC. and EAGLE-PICHER INDUSTRIES, INC.,

Defendants/Third-Party Plaintiffs/Appellants,

v.

A. C. & S., INC.; AMERICAN ASBESTOS TEXTILE CORP., a/k/a AMATEX CORP.; ARMSTRONG CORK, INC.; ASARCO, INC.; CAREY CANADA, INC.; THE CELOTEX CORP., successor in interest to PHILIP CAREY MANUFACTURING CO., PHILIP CAREY CORP., BRIGGS MANUFACTURING CO., and PANACON CORP.; COMBUSTION ENGINEERING INC.; CROWN CORK & SEAL CO.; FIBREBOARD CORP.; THE FLINTKOTE CO.; FORTY-EIGHTY INSULATION, INC.; GAF CORP., successor by merger with RUBEROID CO.; GARLOCK INC., JOHNS-MANVILLE SALES CORP.; J.P. STEVENS INC.; KEENE CORP., successor by merger with BALDWIN-EHERT-HILL a/k/a ASTEN HILL; NICOLET INDUSTRIES; OWEN-CORNING FIBERGLAS CORP.; OWENS-ILLINOIS CORP.; OWENS ILLINOIS GLASS; PITTSBURGH CORNING CORP.; RAYBESTOS-MANHATTAN; SOUTHERN TEXTILE; STANDARD ASBESTOS; UNION ASBESTOS; RUBBER CO. a/k/a UNARCO INDUSTRIES, INC.,

Defendants,

v.

UNITED STATES OF AMERICA,

Third-Party-Defendant/
Appellee.

Philip A. Talmadge, Karr, Tuttle, Koch, Campbell Mawer, Morrow & Sax, P.S., of Seattle, Washington, and Joe G. Hollingsworth, Spriggs, Bode & Hollingsworth, of Washington, D.C., argued for defendants/third-party-plaintiffs/appellants. Allen R. Sakai, of Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax, P.S., and Paul G. Gaston and Edward M. Fogarty, Spriggs, Bode & Hollingsworth, were on the brief, of counsel. David S. Fishback, Sr. Trial Counsel, and H. Michael Semler, Department of Justice, of Washington, D.C., argued for third-party-defendant/appellee. With them on the brief were Richard K. Willard, Assistant Attorney General, J. Patrick Glynn, Director, Harold J. Engel, Deputy Director, JoAnn J. Bordeaux, Assistant Director Henry Miller, Trial Attorney, Gene S. Anderson, United States Attorney, and Joseph B. Cox, Jr., Assistant Director, Torts Branch, Civil Division.

Robert M. Bruskin, James F.C. Worrall and Harvey G. Sherzer, Howrey & Simon, of Washington, D.C., Dennis H. Markusson, Robert D. Batson, Nancy E. Stead, and Richard E. Maunier, Manville Corporation, of Denver, Colorado were on the brief for Amicus Curiae Johns-Manville Sales Corporation.

Paul A. Zevnik, Kaye, Scholer, Fierman, Hays and Handler, of Washington, D.C., and Max Gitter and Stuart M. Cobert, Paul, Weiss, Rifkind, Wharton & Garrison, of New York, New York, were on the brief for Amicus Curiae GAF Corp.

Appealed from: U.S. District Court for the Western District of Washington at Seattle

Judge McGovern

DECIDED: September 28, 1988

Before MARKEY, Chief Judge, RICH, Circuit Judge, NICHOLS and BENETT, Senior Circuit Judges, and ARCHER, Circuit Judge.

NICHOLS, Senior Circuit Judge.

This is a test case,* appealed from the United States District Court for the Western District of Washington (McGovern, C.J.), Civil Action No. C84-155M, representative of numerous claims by present or

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* The only parties on appeal are Raymark and Eagle-Picher.

former workers at the Puget Sound Naval Shipyard (PSNS), or their widows, against companies which supplied to the United States Navy products for insulation on shipboard that contained asbestos. Lopez was a civilian pipe fitter, pipe coverer, and insulator at PSNS from 1947 to 1984. Of numerous defendants, Raymark and Eagle-Picher settled with Lopez for $7,200 and $10,000, respectively, for disabilities supposed to result from breathing air-borne asbestos dust, presumably, for purposes of this case, from products supplied to PSNS by Raymark and Eagle-Picher. Lopez also received an award from his employer, the United States, under the Federal Employees Compensation Act (FECA), 5 U.S.C. §§ 8101-93, but pursuant to section 8132, was required to refund it. See United States v. Lorenzetti, 467 U.S. 167 (1984). Raymark and Eagle-Picher joined the United

States as a third-party defendant and seek to be indemnified or reimbursed, in whole or in part, for their settlement payments and litigation expenses.

Lopez originally filed his suit in state court, but defendants removed it to federal court (W.D. of Washington), on diversity. The asserted grounds of federal liability to Raymark and Eagle-Picher were the Tucker Act, 28 U.S.C. § 1346(a)(2), as to claims founded on contracts implied in fact, and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671-80, as to claims sounding in tort. The government, having successfully invoked 5 U.S.C. § 8132 to shift its loss to Raymark and Eagle-Picher, naturally does not welcome their effort to shift it back under the above two statutes. Its motion to dismiss or for summary judgment elicited a judgment of dismissal by the district court, which

is the decision the appeal requires us to review. It is reported as Lopez v. Johns-Manville, 649 F. Supp. 149 (W.D. Wash. 1986).

The appeal was originally filed with the Ninth Circuit, but is here because of the presence of Tucker Act claims and the rule of construction of 28 U.S.C. § 1295(a)(2) laid down in United States v. Hohri, 107 S. Ct. 2246 (1987). See In re All Asbestos Cases, 849 F.2d 452 (9th Cir. 1988). The briefs were originally prepared for the Ninth Circuit and came here with the rest of the case. They were supplemented here. There are amicus briefs. We have carefully considered all briefs and heard oral argument on behalf of Raymark and Eagle-Picher separately. Our conclusion is that we affirm the judgment of the district court, though not in all respects on the same reasoning. As to the Tucker

Act claims, we affirm primarily on the basis of our own case law as we are meant to be the primary or sole source of case law construing that act since our establishment. United States v. One (1) 1979 Cadillac Coupe de Ville, 833 F.2d 994, 997 (Fed. Cir. 1987). As to the Tort Claims Act claims, we look primarily to the law of the Ninth Circuit, since such claims are here only as pendants to other claims. Molins PLS v. Quigg, 837 F.2d 1064, 1066, 5 USPQ2d 1526, 1527 (Fed. Cir.), cert. denied, 108 S. Ct. 2822 (1988).

Discussion

Tucker Act Jurisdiction

Since the statutory basis of our jurisdiction is the presence of Tucker Act claims under 28 U.S.C. § 1346(a)(2), we consider them first. The government, of course, purchased products containing asbestos under written contracts and pur-

chase orders, but the case has proceeded in a partial vacuum so far as concerns the specific texts, and in view of the lapse of time, it may be impossible now to produce them all. Some are known. It is reasonable to suppose, and the district court did suppose, they specified what asbestos the purchased products should contain, as asbestos was the most effective insulating element, and its perils, that made its use so undesirable, were only beginning to be known at the time of Lopez's first employment. On the other hand, from the arguments on behalf of Raymark and Eagle-Picher, we assume it is not now contended that the contracts or purchase orders contained any written warranties to sellers; it would be surprising indeed to see express warranties running from the buyer to the seller, especially when their legality would have been in doubt, as the

able district court supposed. We are considering implied warranties.

The theory is that in specifying asbestos, the government made an implied warranty to sellers that its own use of the products would not expose the sellers to unforeseen defective product liabilities to persons who might be injured by breathing clouds of asbestos dust, lethal as we now know such clouds to be.

The decision of the district court implies that a contract action on such a theory is simply not available to sellers to the government under the Tucker Act. If the decision does not rest on a broad range of possible factual assumptions, under the pleadings, it cannot be sustained.

The court quotes Santisteven v. Dow Chemical Co., 506 F.2d 1216 (9th Cir. 1974), which rejects the supposed liability of a buyer to a seller, not to use a dan-

gerous substance in a manner to expose the seller to liability to the buyer's employees. The analysis, however, deals with tort law and that of contracts implied at law, while for Tucker Act jurisdiction the claimant must allege a contract obligation implied in fact. The Tucker Act, as the court correctly states, does not confer jurisdiction of claims against the United States on contracts, implied at law, they must be implied in fact. Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980); Merritt v. United States, 267 U.S. 338 (1925).

The asbestos suppliers, in the numerous cases now pending which seek indemnity from the United States against their liability to United States employees, frequently mention two cases that were brought under the Tucker Act, and do enforce warranty contracts implied in fact, running from

buyer to seller. We will add a third, and there are others.

The first and most famous is United States v. Spearin, 248 U.S. 132 (1918). Spearin had contracted to build a drydock at a navy yard (as Naval shipyards used to be called). The government, according to its custom, required construction contractors to build according to very detailed plans and specifications. Spearin was required to relocate a sewer according to plan, but the plan was defective in that it required Spearin to make the sewer, as relocated, discharge into another sewer which, as the plan failed to show, was itself blocked. The result was disaster. The Court (Brandeis, J.), said at 136:

> But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.

And, at 137:

> But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance. [Footnotes omitted.]

The case establishes a principle of broad application, but it is obvious a construction contract, with its massive detail all prescribed by the owner, supports a fact implication in a way a mere supply contract could hardly ever do, except one which exacts a like conformity to the buyer's prescription of detail. One which did is also frequently cited: Ordnance Research, Inc. v. United States, 609 F.2d 462 (Ct. Cl. 1979). The contract was for production of igniters for fire bombs. This involved

blending some very volatile explosives. The government had experience making these igniters; the plaintiff had none. The government provided very detailed specifications how to do it, but they were defective and in following them, plaintiff experienced a series of disastrous explosions with loss of life. The court held the government warranted -- as we have seen, by an implication of fact -- that if its instructions were followed, safe blending could be achieved. The specifications were in fact defective and in breach of the warranty.

In USA Petroleum Corp. v. United States, 821 F.2d 622 (Fed. Cir. 1987), the government contracted for several deliveries of petroleum by the vendor. It required that it determine the quantity delivered by each tanker load according to measurement means it provided. The means

were defective and overpayments ensued which the contractor passed on to its suppliers and could not recover, yet the government demanded refund of its overpayments when the defects were at length discovered. It was not a very difficult deduction of fact, that in exacting use of its measurement means, the government impliedly warranted that its measurements means were correct.

It was characteristic of these cases that the circumstances strongly supported a factual inference that a warranty was implied. The counsel for asbestos suppliers here seem to think it is enough for a Spearin warranty that the government specified any characteristic at all in the merchandise it purchased. They do not know and cannot tell us whether the government specifications differed at all from those of private customers of Raymark and Eagle-

Picher, or if they did, whether the difference related to the asbestos content of the material supplied. We know, as a matter of judicial notice today, that all insulating material containing asbestos is hazardous, that supplied to government and private customers alike. We can assume this was not so well known when the material was ordered. Even in a "reverse warranty" claim by an asbestos supplier against a private company, where the concept of implied warranty is not confined to implied in fact cases, it has been held the alleged warranty cannot be implied. White v. Johns-Manville Corp., 662 F.2d 243 (4th Cir. 1981).

This court has held that a Spearin-type warranty is implied only in design specifications, not performance specifications. Stuyvesant Dredging Co. v. United States, 834 F.2d 1576, 1583 (Fed. Cir. 1987). It

is not explained how any supposititious specifications for asbestos-containing insulating material could have been of the design type. Judge McGovern had held the government asbestos specifications were performance specifications, and this holding is not appealed. When a construction contract is not involved, as in Ordnance Research, some other provision telling just how to do the job, takes the place of literal design. The contractor has a right to rely on an "indicated method of manufacturing the end product." Natus Corp. v. United States, 371 F.2d 450, 455 (Ct. Cl. 1967). It is not shown how the government could have supposed it needed to tell Raymark and Eagle-Picher how to make asbestos insulation, or how they needed to rely on such instructions.

In the absence of allegation or showing of circumstances requiring a conclusion

that a Spearin warranty was implied, the asserted warranty would be, if it had judicial approval, implied at law, not fact, and a Tucker Act court would lack jurisdiction to imply it. As a matter of an implication of fact, an implied warranty relating to the use by the buyer after delivery, and warranting it would not harm the seller is novel, and no reason is shown why anyone could have so supposed at the date of sale by any inference from the circumstances. It would be just as reasonable for the parties to the sale to have implied a warranty by the seller, that apart from dangers the seller warned of, the insulation would not endanger the buyer or its employees. Either way it would be a warranty implied in law, not fact.

The Anti-Deficiency Act

The district court also relied on the Anti-Deficiency Act, 31 U.S.C. § 1341,

which provides that no government official may make or authorize an expenditure in excess of an available appropriation, or make a contract obligating money before an appropriation is made unless authorized by law. The reasoning of the court is that an express warranty to suppliers of asbestos products, of the kind asserted, would be illegal, and therefore an implied warranty must be so too. We have doubts about this, and as we need not rely on it, we do not do so. An express warranty would be a thing of value in addition to the purchase price. The contracting officer could pay money out if he found the warranty required it. On the other hand, a Spearin-type implied warranty is, if breached, enforceable only in the courts. At times, as in Ordnance Research, supra, it is enforceable under contract changes articles and no breach of the contract necessarily occurs, but if a

contracting officer were going to issue a change order settling a claim, he would be limited to appropriated funds then available. However, appeal boards by the Contract Disputes Act of 1978, 41 U.S.C. § 607(e), can grant any relief the Claims Court could grant, i.e., including damages in breach cases. There is a standing appropriation to pay court judgments and appeal board awards, 31 U.S.C. § 1304, so courts and boards, in rendering judgment, are not required to investigate whether program funds are available. In the circumstances, we are reluctant to found our holding on the Anti-Deficiency Act, and to do so would severely hamper the enforcement of Spearin-type warranties in the courts. Our appreciation of the bizarre and novel nature of the "reverse warranty" here asserted, and its lack of support in the alleged facts or the court decisions, does

not require recourse to the Anti-Deficiency Act to persuade us that the Tucker Act does not provide means to enforce the alleged warranty here. If implied at all, it is not implied in fact. Raymark and Eagle-Picher have not stated claims on which relief can be granted.

Special Relationship.

Raymark and Eagle-Picher have, in this case, kept discussing an alleged "special relationship," i.e., certain special circumstances whose alleged existence fixes government liability. We must not forget, however, that absent an effective consent to be sued, the United States cannot be made a defendant, third party, or otherwise, in any court. The consents we operate under here are the Tucker Act and the FTCA. No others are alleged. The grievance seems to be in real terms that the United States knew more about the hazards

of asbestos than it ever disclosed to its suppliers. If, supposedly, they had known all the government knew, they would have gone out of the asbestos business at once, and saved themselves untold liability, or else would have purchased all the insurance available and passed the cost on to the United States and other customers in sharply higher prices.

On motion to dismiss or for summary judgment, we may have to suppress our wonderment that anyone could have known more about the hazards of asbestos than those responsible companies who used it as raw material in the production of insulation. We must assume the government did know things it did not reveal, and that it used a defective product in ways that added to the hazard, but were not known to suppliers. We must also disregard the results of actual trials which have dealt with this

imputation, as they are not part of the present record.

So far as this contention asserts an implied warranty, it is dealt with already in our section, supra. There is, also, case authority under the Tucker Act applying a different but related theory. Under these cases, nondisclosure to a bidder at the time of his bid of information essential to successful performance of the construction is treated at times as a breach. Examples are Hardeman-Monier-Hutcherson v. United States, 458 F.2d 1364 (Ct. Cl. 1972); J. A. Jones Constr. Co. v. United States, 390 F.2d 886 (Ct. Cl. 1968); Helene Curtis Industries, Inc. v. United States, 312 F.2d 774 (Ct. Cl. 1963). In American Ship Bldg. Co. v. United States, 654 F.2d 75 (Ct. Cl. 1981), the court set limits on the scope of breach liability for nondisclosure of superior knowledge. It held the

doctrine is generally applied when a contractor (1) undertakes to perform without vital knowledge of a fact that affects performance costs or direction, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information. Since the government is entitled to presume that one who bids on a government invitation knows his own capabilities and has ascertained he will be able to produce, and at what cost, it would be up to the contractor, complaining of a breach by nondisclosure, to produce specific information to back up his contention.

The government might reasonably suppose Raymark and Eagle-Picher knew enough about asbestos and its perils not to need to

learn more about it from the government. They would after all not be held liable to pay anything on any asbestosis or lung cancer claims if they had not marketed a defective product. They say the buyer owed them a duty to tell them their product was defective, intrinsically or as actually used. Such a contention is new to the "superior knowledge" doctrine and does not fit it at all well. It does not deal, for example, with how the government is supposed to know the supplier of asbestos needs information about asbestos it does not have. Surely a statement by a supplier to the government when the material was delivered would have attracted notice and would not have been forgotten. We must presume that government officials acted in good faith, the contrary not being alleged. Acting in good faith, they could not have knowingly exposed their own employees to

undue asbestos hazards. Maybe they had a duty to know more than they did, e.g., to follow up clues to danger they actually had received. Raymark and Eagle-Picher have asserted then, not only a duty of the customer to inform the supplier that his product is defective, but a duty to find out what he does not already know. This does not fit the superior knowledge doctrine and cases exactly like a glove. Then there is the question what the contract specifications actually said that misled the contractor.

We think the case law dealing with a government breach of a contract by nondisclosure of superior knowledge cannot be made to support the claims here in suit without so drastic a restructuring that we would be engaging in judicial legislation. We note that the Supreme Court has recently considered the plight of a government con-

tractor exposed to liability to third persons from manufacturing defective products to government specifications. Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988). The Court extends the government's immunity to the contractor under carefully limited conditions in what is called the "government contractor defense." Before us the effort is to reduce the government's immunity and it appears logically inconsistent with the Supreme Court's approach. If the appellants Raymark and Eagle-Picher were really markedly exposed to Lopez and his future claims, and so many other claimants, by reason of conforming to government specifications and, if the otherwise carefully prescribed conditions are met, there should be no damage awards on which to base claims for government indemnity or contribution. There then is a conflict of logic between the government contractor

defense and the logic on which the third party alleged liability of the government here is based. This is a factor counseling caution when we are asked to extend Tucker Act liability on new and novel grounds, only superficially based on case law as known hitherto. We are not to be understood as saying the government contractor defenses ought to have defeated Lopez's claim. No such issue is before us and we do not pass upon it. Judge McGovern has held the contrary, chiefly on the ground the involved specifications displayed before him were performance, not design specifications.

Federal Tort Claims Act.

The district court also gave careful consideration to the Federal Tort Claims Act, which at 28 U.S.C. § 2674, makes the United States liable respecting tort claims to the same extent as a private individual

under like circumstances. By 28 U.S.C. § 1346(b), the circumstances must be that the supposititious private individual "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Since United States v. Yellow Cab Co., 340 U.S. 543 (1951), it has been settled that in a private tort case, a person may bring in the United States as third-party defendant for indemnity or contribution if the United States was wholly or in part at fault. As there has been no trial, the fault of the United States has not been determined, but a problem here is, assuming it was at fault, Lopez was one of its employees and it is provided by FECA, 5 U.S.C. § 8116(c), that the liability of the United States under that act to the injured employee or his legal representative, spouse, dependants, etc., shall be exclusive of all

other liability to such claimants "in a direct judicial proceeding."

The United States, as already stated, has recovered its compensation paid to Lopez because of his other recoveries, but this is not of legal importance. In Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983), the Supreme Court held that Lockheed, having been sued by the administrator of a deceased federal employee compensated under FECA, could implead the United States as a third-party defendant, and was not barred by section 8116(c). The result on remand would depend on the validity of the "underlying substantive claim," and was not decided. The district court and the parties assume that Lockheed does not make the United States liable in this case on the underlying claim, and that will depend on how one identifies the private individual and what

local law prescribes as to his liability. As to that, there are three theories that, (1) judge-made admiralty law will govern, (2) Lopez was a maritime worker and the liability would be that of a "negligent shipowner" under the Longshore and Harbor Workers Act, 33 U.S.C. § 901 and ff (LHWCA), because local law would have to step aside even though the injury was suffered in the State of Washington, and (3) the LHWCA does not apply and local Washington worker's compensation law will determine liability, because Lopez was not a maritime worker.

These issues are not confided to us, as Tucker Act claims are, as the intended sole source of appellate law, and as stated we look for guidance to Ninth Circuit case law, but such law does not take us to the end of our task. Before Hohri, the parties elaborately briefed this case, and at

impressive length, for the Ninth Circuit, whose tolerance for prolixity they must consider to surpass ours. They must have supposed, and by their arguments and citations obviously did suppose, that the Ninth Circuit would be unable to find guidance in its own precedents. Under the circumstances, we must try to determine what the Ninth Circuit would have decided.

(1) Theory 1 is that product liability can be asserted on behalf of a pipe fitter against a producer of unsafe asbestos products under traditional judge-made admiralty law, if the pipe fitter was building or repairing vessels on navigable waters. Presumably the manufacturer could then pursue indemnity from the United States under the Lockheed doctrine, and section 8116(a) would not suffice for a defense, so far as the vessels were government owned. This theory fails at its first

step, however, in the Ninth Circuit, which in two carefully considered decisions has held that admiralty jurisdiction is wanting (a) over new vessel construction, because new construction is traditionally nonmaritime and not subject to admiralty law, Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967 (9th Cir. 1983), and (b) over vessel repair, so far as concerns product liability to a pipe fitter, at least, because to distinguish between the same pipe fitter's work over the years between his work on new vessels, and on repair, would be "a mechanical analysis" (and besides, one would think an unpracticable distinction to draw as a factual matter). Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984). The court relies on Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972), as authority to reject mere location on the water as

a test of maritime activity and to consider also the nature of the work the pipe fitter performs. Of course, in an office building it would be little different. The pipe fitter is not a seaman, nor does he do work traditionally done by seamen. The United States was not a party to those cases, so there is no question as to the jurisdiction of the Ninth Circuit to render the decisions. Authority from other circuits is not needed by us, but the Ninth Circuit itself cites Harville v. Johns-Manville Corp., 731 F.2d 775 (11th Cir. 1984), in which a still more elaborate analysis may be found. See also Austin v. Unarco Industries, Inc., 705 F.2d 1, 8 (1st Cir. 1983); Keene Corp. v. United States, 700 F.2d 836 (2d Cir.), cert. denied, 464 U.S. 864 (1983) ("where a group is composed of workers with and without maritime status [pipe fitters] Admiralty jurisdiction does

not exist as to the group." Id. at 844.) The Ninth Circuit has not taken this stand alone, and we have found no authority to the contrary, except White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). This decision, however, is followed by White v. Johns-Manville Corp., 662 F.2d 243 (4th Cir. 1981), which denies the asbestos manufacturers indemnity for their tort liability from the shipyard involved, the Newport News Shipbuilding and Drydock Co., and thus they cannot invoke the Fourth Circuit for more than the first step where they need a second to be in a good position in this court. If our view matters, we agree with the Ninth Circuit that the first step fails: the pipe fitter's claim is not maritime whether he worked on new construction or repair of vessels.

(2) The LHWCA is a sweeping piece of legislation which, as amended in 1972, does two things -- first, it requires that employers of certain maritime and harbor workers, including those employed in "repairing or building a vessel" obtain insurance to protect their workers against disability or death incurred in course of employment, payable without fault (sections 903-904). An employer who fails to do this is liable under section 905(a) in law or admiralty and is denied several defenses. None of this applies directly to United States Government employees, such as Lopez, who have coverage under other law. Under section 905(b), in case of the "negligence of a vessel," the vessel may also be sued, the employer is not liable to the vessel, and the vessel's former absolute liability under "warranty of seaworthiness" is eliminated.

The asbestos manufacturer's argument is that Lopez worked for the United States in its capacity as a shipowner, and that a negligent private party, a shipowner, is the analogous private person whose liability is to be determined by the "law of the place" of 28 U.S.C. § 1346(b), the "law of the place" not being law of the State of Washington, where the Puget Sound Naval Shipyard is located, but the LHWCA. While the United States is not directly liable to its own civilian employees if injured on its vessels because of 5 U.S.C. § 8116(c), pursuant to the Lockheed doctrine it is liable for contribution on account of its own negligence if its employees are able to enforce liability against third persons for their injuries. According to this theory, recourse to state law is preempted because federal law, the LHWCA, covers the case.

There are numerous conceptual difficulties with this position. The hardest to overcome is, in our view, that section 905(b) is not coextensive in its coverage of employees with those for whom the employer must obtain coverage under section 903. Under that law, those engaged in shipbuilding are covered and must be insured. However, eligibility for worker's compensation under section 903 is not the same as, and may be broader than, general maritime jurisdiction. Rohde v. Southeastern Maritime Drilling Co., 667 F.2d 1215 (5th Cir. 1982). Negligence claims under section 905(b), are those covered by federal maritime principles. Richendollar v. Diamond M. Drilling Co., 819 F.2d 124 (5th Cir.), cert. denied, 108 S. Ct. 331 (1987); Drake v. Raymark Industries, Inc., 772 F.2d 1007, 1011 (1st Cir. 1985). If there was no intention to broaden the

coverage of the judge-made admiralty law concerning vessel "unseaworthiness," and we perceive none in the act, then all the regional circuit cases holding that suits by shipyard pipe fitters for asbestosis do not lie under admiralty principles, likewise preclude indemnity liability under section 905(b). The purpose of section 905(b) is shown in Drake to have been to lessen the vessel's liability for unseaworthiness as a matter of strict liability and to restrict such liability to cases of negligence. Accordingly, the First Circuit has followed its own Drake decision with In re All Maine Asbestos Litigation (PNS cases), 772 F.2d 1023 (1st Cir. 1985), cert. denied, 106 S. Ct. 1994 (1986), which deals with asbestos claims of federal employees, civil servants, rising out of their employment at the Portsmouth Naval

Shipyard. These claimants are, legally, identically situated with Lopez's claim.

The First Circuit passes over, as can we, whether an unequivocal consent to liability of the United States is expressed with respect to indemnification or contribution against claims by federal workers, where the LHWCA itself provides in 33 U.S.C. § 903(b) [§ 902(a)(2) before 1984]:

> No compensation shall be payable in respect to the disability or death of an officer or employee of the United States or any agency thereof.

As to this, we meet ourselves coming back as appellant refers us, of course, to the case of the private shipowner postulated under the FTCA whose employees are not federal employees. But if consent to indemnification claims is granted at all, under these circumstances, it is surely not granted unequivocally. Cf. United States v. Testan, 424 U.S. 392, 399 (1976). We

are inclined to believe that a suit for indemnification or contribution for liabilities incurred to federal employees for their breathing of asbestos, is unconsented even when the LHWCA is read with the FTCA to refer to a private employer.

In Amell v. United States, 384 U.S. 158, 163 (1966), it is held respecting pay claims of seamen who are civil servants employed on government-owned noncombat vessels, that Congress thought of them as government employees who happened to be seamen rather than as seamen who by chance worked for the government. The traditional exclusive admiralty jurisdiction of seamens' wage claims did not extend to them; they could sue under the Tucker Act like other civil servants. Accordingly, it would seem that Lopez was a civil servant rather than a longshore and harbor worker, for purposes of statutory coverage, that

is, the occasional situs of his work on shipboard does not establish LHWCA coverage.

We believe the Ninth Circuit would so hold, in view of its first step, respecting traditional admiralty coverage of pipe fitters working in shipyards, supra.

(3) If federal maritime jurisdiction fails, whether derived from judge-made admiralty law, or from the LHWCA, we agree with the trial court that one must look to the law of the State of Washington to determine whether

> the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

Under that law, the trial court convincingly shows that, absent any express contract commitment, an employer who carried appropriate workmen's compensation insur-

ance would not be liable to indemnify third parties who were obliged to pay damages to the worker for having negligently caused or contributed to his injury. We need not add anything to his able analysis and citations. We believe, moreover, the Ninth Circuit would extend to Judge McGovern's decision the customary deference when it is a matter of a United States District Judge construing the law of his home state. Of course, in case of any contract commitment, the result might be different, but then we have a case not sounding in tort, and it is the FTCA we are now construing.

Conclusion

Since the defendants/appellants, Raymark and Eagle-Picher, are unable to state a cause of action under either the Tucker Act or the FTCA against the United States as third-party defendant for indemnity or contribution, the decision of the United

States District Court for the Western District of Washington must be affirmed, and the United States dismissed as a party to the action.

AFFIRMED

APPENDIX 2

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

United States Court of Appeals for the Federal Circuit

87-1543, -1544

ALBERT LOPEZ and SHIRLEY LOPEZ,

Plaintiffs,

and

RAYMARK INDUSTRIES, INC. and EAGLE-PICHER INDUSTRIES, INC.

Defendants/Third-Party-Plaintiffs/ Appellants,

v.

A. C. & S., INC.; AMERICAN ASBESTOS TEXTILE CORP., a/k/a AMATEX CORP.; ARMSTRONG CORK, INC.; ASARCO, INC.; CAREY CANADA, INC.; THE CELOTEX CORP., successor in interest to PHILIP CAREY MANUFACTURING CO., PHILIP CAREY CORP., BRIGGS MANUFACTURING CO., and PANACON CORP.; COMBUSTION ENGINEERING INC.;

CROWN CORK & SEAL CO.; FIBREBOARD CORP.; THE FLINTKOTE CO.; FORTY-EIGHTY INSULATION, INC.; GAF CORP., successor by merger with RUBEROID CO.; GARLOCK INC. JOHNS-MANVILLE SALES CORP.; J.P. STEVENS, INC.; KEENE CORP., successor by merger with BALDWIN-EHERT-HILL a/k/a ASTEN HILL; NICOLET INDUSTRIES; OWENS-CORNING FIBERGLASS CORP.; OWENS-ILLINOIS CORP.; OWENS ILLINOIS GLASS; PITTSBURGH CORNING CORP,; RAYBESTOS-MANHATTAN; SOUTHERN TEXTILE; STANDARD ASBESTOS; UNION ASBESTOS; RUBBER CO., a/k/a UNARCO INDUSTRIES, INC.,

Defendants,

v.

UNITED STATES OF AMERICA,

Third-Party-Defendant/Appellee.

Before MARKEY, Chief Judge, RICH and ARCHER, Circuit Judges, NICHOLS and BENNETT, Senior Judges.

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and same hereby is, denied.

FOR THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart
Clerk

November 21, 1988

cc: Philip A. Talmadge
Joe G. Hollingsworth
David S. Fishback
Paul A. Zevnik

APPENDIX 3

TITLE 28, UNITED STATES CODE

§ 1346. **United States as defendant**

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

. . .

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

§ 1346. **United States as defendant**

. . .

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2674. **Liability of United States**

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case, wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to

the persons respectively, for whose benefit the action was brought, in lieu thereof.

TITLE 33, UNITED STATES CODE

§ 902. **Definitions**

When used in this chapter --

. . .

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, . . .

. . .

(21) Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

§ 905. **Exclusiveness of liability**

. . .

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an

action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

REVISED CODE OF WASHINGTON

51.04.010 Declaration of police power -- Jurisdiction of courts abolished. The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced

the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

88-1418

No. __-____

Supreme Court, U.S.
FILED
MAR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

RAYMARK INDUSTRIES, INC.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Supplemental Appendix to
PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Federal Circuit

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February 28, 1989

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALBERT LOPEZ, et ux.,	)	
	)	No. C84-155M
Plaintiffs,	)	
	)	ORDER GRANTING
A.C.& S., INC., et al.	)	MOTION OF
	)	UNITED STATES
Defendants.	)	FOR DISMISSAL
	)	

INTRODUCTION

The United States moves to dismiss the third-party claims of Raymark Industries, Inc. and Eagle-Picher Industries, Inc. or for summary judgment. This case, and eighteen others in which the United States is a third-party defendant, arises out of asbestos exposure at Puget Sound Naval Shipyard (PSNS); both manufacturers who have brought third-party claims are involved in this case, and all major legal issues are raised.

Plaintiff Albert Lopez, was a civilian pipefitter, pipecoverer, and insulator at

PSNS from 1947 to 1984 and was covered by the provisions of the Federal Employees Compensation Act (FECA) 5 U.S.C. § 8101-8193. Plaintiff has received FECA benefits, but following Plaintiffs' settlements with manufacturers, the United States has recovered from him (after his deduction of costs, reasonable attorney fees, and an amount equal to 20% of the remainder) all sums it paid pursuant to FECA, as required by 5 U.S.C. § 8132.[1]

---

1 The purposes for this requirement of reimbursement are (1) to prevent an employee from recovering twice for the same injury and (2) to keep the fund solvent and to minimize the cost of the program. Lorenzetti v. United States, 710 F.2d 982 (1983). Moreover, the Supreme Court, ruling unanimously in Lorenzetti on appeal, held that the plain meaning of the statutes entitles the United States to reimbursement under § 8132 regardless of whether the award or settlement in satisfaction of the third-party liability is for losses other than medical expenses or lost wages. United States v. Lorenzetti, 467 U.S. 167 (1984).

Plaintiff will become eligible for additional FECA payments should his medical expenses ever exceed the amount recovered from the manufacturers.

Plaintiffs filed suit against approximately 20 manufacturers and suppliers of asbestos-containing products. The complaint was settled as to all manufacturers except those in bankruptcy. Meanwhile, the third-party complaints were filed. Other manufacturers dismissed their third-party claims, but Raymark and Eagle-Picher seek to recover the respective settlement amounts of $7,200 and $10,000, plus associated fees and costs. The manufacturers assert claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671-2680; the Tucker Act (contract claims), 28 U.S.C. §§ 1346(a)(2), 1402; and in admiralty.

DISCUSSION

A. Federal Tort Claims Act.

The United States has waived sovereign immunity respecting tort claims in the Federal Tort Claims Act (FTCA) at 28 U.S.C. § 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, . . .

This waiver extends to third-party claims against the Government. United States v. Yellow Cab Co., 340 U.S. 543 (1951).

The FTCA confers the federal courts with exclusive jurisdiction over

> civil actions on claims against the United States . . . for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

Another statute is relevant to consider in this case. A provision of the Federal Employees' Compensation Act (FECA) limits the Government's liability to employees who have received compensation under the act. 5 U.S.C. § 8116(c). This section provides in pertinent part as follows:

> (c) The liability of the United States or an instrumentality thereof under this subchapter [5 USCS §§ 8101-8193] or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. . . .

Thus, in return for paying benefits to injured Government employees regardless of

fault, the Government is immunized from further tort liability.

1. Effect of FECA on Third-Party Indemnity/Contribution Claims.

Eagle-Picher and Raymark argue that Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983) further extends the FTCA waiver of sovereign immunity from tort liability to third-party claims arising out of injuries to federal employees covered by FECA.

The Government contends that Lockheed does not so extend the FTCA waiver of immunity, did not confer an indemnity/contribution action upon third parties, and that although the FECA may not directly bar such suits, the Supreme Court recognized the possibility that the underlying substantive law might. The Court in Lockheed stated in its holding:

> The District Court held that Lockheed had a right to indemnity under the governing substantive law,

> but the Court of Appeals did not rule on that question. Accordingly, we do not consider it. We adhere to the decision in Weyerhaeuser, and hold only that FECA's exclusive-liability provision, 5 U.S.C. § 8116(c), does not directly bar a third-party indemnity action against the United States.

Id. at 199, 103 S.Ct. at 1039. The Court reasoned that FECA's exclusive-liability provision, 5 U.S.C. § 8116(c), governs only the rights of employees, their relatives, and people claiming through or on behalf of them -- these being the only parties benefiting from the quid pro quo compromise of FECA -- and that Congress has not modified this provision to include third parties. Id at 193-199, 103 S.Ct. at 1036-39.

The dissenting opinion in Lockheed is of interest here because the ideas elucidated therein echo important concerns at the heart of the issues at bar. In his dissent, Justice Rehnquist distinguished earlier cases relied on by the majority

where the balance struck between competing policies favored rights to recovery based on "the special relationship between the third party and the employer created by ancient maritime law or by voluntary agreement." Id. at 201, 103 S.Ct. at 1040. The only relationship that Lockheed could claim, however, continued Justice Rehnquist, was one based on the Government's breach of duty of care owed its employee. Thus, Lockheed's case involves an indirect sharing of responsibility among wrongdoers rather than a breach of direct duty owed Lockheed. Id. at 202, 103 S.Ct. at 1040-41. Therefore, concluded Justice Rehnquist,

> For these reasons, I am convinced that we should retain the balance our earlier decisions would require. Where a third party has a direct action against the Government that fits into the same category as the claims we have allowed in the past, it may include a claim for damages it has paid to a Government employee. But where the third

> party's claim is an indirect action based on contribution or indemnity, Congress' clear intent to limit the liability of the United States should prevail.

Id. at 203, 103 S.Ct. at 1041.

Justice Rehnquist reached his conclusion by taking a broader, policy oriented perspective, and would find FECA's limitation provision waived for third-party suits only where there existed a special relationship creating direct duties. Although Eagle-Picher and Raymark assert that the Government breached independent duties owed them, this claim need not be addressed here in view of Lockheed's majority holding. For now, Lockheed will permit a third-party suit for contribution, FECA provisions creating no bar. There remains the question of whether the governing substantive law provides Eagle-Picher and Raymark with a right to indemnity.

2. Washington Law Applies.

a. The Joint Tortfeasor Requirement.

The FTCA requires that the court apply the law of the state "where the act or omission occurred." 28 U.S.C. §1346(b). There is no dispute that the tortious conduct complained of occurred in Washington state.

The manufacturers apply Washington law up to a point. Eagle-Picher argues that under Washington's choice-of-law principles the Court must consider its claim against the United States as vessel owner pursuant to the federal jurisprudence of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b).[2] Under the circumstances of this case, the argument continues, Washington state courts would

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2 "Longshoremen" changed to "Longshore" by Amendments of 1984, Pub. L. No. 98-426, § 27(d).

have to look to the federal statute to determine the liability of a private person, thus, this court must look to that law in adjudging the conduct of the Government. See, Lambertson v. United States, 528 F.2d 441, 444 (2d Cir.), cert. denied, 426 U.S. 921, 96 S.Ct. 2627, 49 L.Ed.2d 374 (1976).

Raymark comes to the same conclusion arguing that although a private employer is immune from suit by its employees and third-parties claiming noncontractual indemnity or contribution, RCW 51.04.010, Glass v. Stahl Specialties Co., 97 Wn.2d 880, 652 P.2d 948 (1982), Title 51 does not reach activity covered by maritime remedies. RCW 51.12.100. The applicable maritime remedy is the LHWCA which sanctions third-party lawsuits against the United States in its capacity as vessel owner. 33 U.S.C. §§ 905(b), 902(21); Lockheed, 460 U.S. 190, 103 S.Ct. 1033 (1983); In re All

Asbestos Cases, 603 F. Supp. 599 (D. Hawaii 1984).

Summarized, the manufacturers' argument, characterizing the Government's activities as maritime, applies only Washington's choice-of-law principles, then argues that LHWCA federal jurisprudence allows third-party lawsuits against compensation paying employers who are also vessel owners (a "dual capacity" theory).

The Government argues, first, that the 1981 Tort Reform Act abolished indemnity, inter alia, where trial on the underlying claims had not taken place by July 26, 1981. RCW 4.22.040(3) and 920(2). The manufacturers counter that only indemnity between active and passive tortfeasors was abolished, and that nothing in the statute extinguished other circumstances under Washington law where indemnity is allowed: where an express contract so provides or

there existed (and was breached) an independent duty between the putative indemnitor and indemnitee.

While the manufacturers appear to imply two bases for allowing indemnity, Glass v. Stahl, 97 Wn.2d 880, 652 P.2d 948 (1982), however, speaks of the need for express, written agreements before an employer may be deprived of the immunity provided by Washington's Industrial Insurance Act:

> This court has recognized, however, that a third party claim against the employer can be maintained if the employer "voluntarily assumes an independent duty or obligation to the third party." Generally, Washington courts have required that a written indemnification agreement between the employer and the tortfeasor exist before such an independent duty or obligation could be found. Such agreements purporting to deprive an employer of the immunity provided by the Industrial Insurance Act are disfavored under Washington law, and any intent to provide for indemnification must be clearly expressed in the agreement.

Id. at 885-86, 652 P.2d at 951. (Citations omitted.) Therefore, there being no cause of action for indemnity between active and passive tortfeasors, RCW 4.22.040(3), nor a written indemnification agreement, nor other clear indication that the parties intended to provide for indemnification, the manufacturers' cause of action for indemnity is dismissed.

Second, the Government argues that although the 1981 Tort Reform Act created a right of contribution in those cases not tried by July 26, 1981, contribution runs only against joint tortfeasors, i.e., persons "who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm." RCW 4.22.040(1); Glass, 97 Wn.2d at 883, 652 P.2d at 950. The Government argues that it has no tort exposure or liability to the Plaintiff because the FECA guarantees com-

pensation for workplace injuries regardless of fault in return for workers giving up their right to sue. Since employees have no right to sue in tort, the Government has no tort liability and cannot be a joint tortfeasor. Also, continues the Government's argument, viewing the United States as a private employer, as the FTCA requires, a private employer in Washington is covered by the State's Industrial Insurance Act. RCW Title 51. The Act's exclusive remedy provision, RCW 51.04.010, abolished all employee actions against employers for workplace injuries, and the jurisprudence construing that provision precludes "dual capacity" suits and parallel third-party claims for contribution.

Pursuant to the requirements of the FTCA, and there being no doubt that the underlying alleged tortious conduct occurred in Washington, the manufacturers'

claims for contribution must be viewed in accordance with Washington law concerning contribution. The question is whether under the circumstances of this case, Raymark and Eagle-Picher have a claim for contribution under Washington law. The 1981 Tort Reform Act provides that in those cases not tried before July 26, 1981, contribution runs against persons "who are jointly and severally liable upon the same indivisible claim, for the same injury, death or harm." RCW 4.22.040(1). The question then becomes whether, pursuant to RCW 4.22.040(1), the Government is jointly and severally liable for Plaintiff Lopez's injury. The FECA, by virtue of its paying employees immediate, fixed benefits, regardless of fault, without the need for litigation, but in return for the employee giving up the right to sue, precludes the Government from being a joint tortfeasor.

This conclusion is mandated by the logic of long-standing Ninth Circuit opinion holding that because of the FECA exclusive remedy provision, the United States cannot be a joint tortfeasor for the purposes of third-party recovery where federal employees are involved. In United Air Lines v. Wiener, 335 F.2d 379 (9th Cir.), cert. dismissed sub nom. United Air Lines v. United States, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964), the Court concluded, first, as did the Supreme Court later in Lockheed, that the FECA did not itself bar recovery by a third party, and, second, that under applicable state law, indemnity was available only against joint tortfeasors; owing to the exclusive liability provision of FECA, the United States had no tort liability to the deceased federal employees or their survivors. "There being no underlying liability on the part of the

government, United's claim for indemnity must fail." Id. at 404. This conclusion was later reaffirmed in Wien Alaska Airlines v. United States, 375 F.2d 736 (9th Cir.), cert. denied, 389 U.S. 940, 88 S.Ct. 288, 19 L.Ed.2d 291 (1967). Still later, the Ninth Circuit found no justification for reconsidering Wiener. Adams v. General Dynamics Corp., 535 F.2d 489 (9th Cir. 1976).

Thus, under the analysis provided in the foregoing cases, the manufacturers do not have a claim for contribution under Washington law because the FECA exclusive liability provision precludes the United States from being a joint tortfeasor for purposes of third-party recovery.

b. The Analogous Private Person.

Even if the foregoing Ninth Circuit opinions could be avoided and the United States considered a joint tortfeasor, the

next step would be to view the United States as a private individual under like circumstances, pursuant to 28 U.S.C. § 1346(b), and the same result would obtain. On the issue of whether the circumstances are such that the Government, if a private person, would be liable in accordance with Washington state law, the Government argues that the analogous private individual is a Washington employer covered by the Washington Industrial Insurance Act, while the Defendant manufacturers argue that the analogous private party is a private shipyard/vessel-owner employer in Washington covered by the LHWCA.

To determine whether the circumstances are such that the United States as a private person would be liable to the manufacturers, it is logical to focus on the most significant elements of the circumstances. Significant elements obviously are elements

material to the issue of liability. Immunization from tort liability pursuant to an arrangement where the employer pays benefits regardless of fault is as significant as the allegations of breach of duty. The analogous private person, then, is a Washington employer covered by the Industrial Insurance Act, RCW Chapter 51.04-51.98, because that Act contains an exclusive liability provision similar to that of the FECA.

The Government and the manufacturers are in agreement on the effects of the Industrial Insurance Act on a covered employer. A Washington employer covered by the Industrial Insurance Act has the benefit of the Act's exclusive remedy provision, RCW 54.04.010, which abolishes all employees' actions against employers for work place injuries. Washington case law construing the exclusive remedy provision

of the Washington Industrial Insurance Act has concluded that this provision, "of the broadest, most encompassing nature," West v. Zeibell, 87 Wn.2d 198, 201, 550 P.2d 522, 524 (1976), precludes dual capacity suits, Thompson v. Lewis County, 92 Wn.2d 204, 206, 595 P.2d 541, 542-44 (1979), and parallel third-party claims for contribution: "Where there is no liability, there can be no joint and several liability. Where there is no joint and several liability, there is no right of contribution." Glass, 97 Wn.2d at 886-87, 652 P.2d at 952. Therefore, under Washington law, a private person in circumstances similar to the Government, would not be liable to third parties claiming contribution, owing to the similar operation of the Washington Industrial Insurance Act to the FECA.

To consider the Government as a private employer covered by the LHWCA would be to

ignore the FECA as a significant aspect of the Government's circumstances. While Section 905(a) of the LHWCA provides exclusive liability to the employer, Section 905(b) preserves an action against the vessel, i.e., against the ship owner, notwithstanding that the employer and ship owner may be the same.[3] See, Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). Thus, the Government was seen having a dual capacity of employer and ship owner, being immune in the former, but subject to traditional tort liability in the latter capacity until the law was changed. Clearly, an employer subject to the LHWCA before amendment does not abide in circumstances

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3 Amendment to Section 905(b) of September 28, 1984 barred suits by private shipyard employees covered by LHWCA against the employer as ship owner. Sections 5(a)(1) and 28(c), Pub. L. 98-426, 98th Cong., 2d Sess.

similar to the United States subject to the FTCA and the FECA.

There are other impediments to analyzing the Government's liability in these circumstances under the LHWCA. The LHWCA expressly excepts from coverage employees of the United States or any of its agencies. 33 U.S.C. § 903(a)(2) (now 33 U.S.C. § 903(b) by amendment of September 24, 1984). Plaintiff Lopez would be an excepted employee. The manufacturers' argument requires the application, through Washington's choice-of-law rules, of federal jurisprudence construing the LHWCA. The LHWCA must apply, according to the argument, because the Washington Industrial Insurance Act does not cover those aspects of shipyard activity covered by maritime remedies. RCW 51.12.100. The United States would thus be subject to liability for harm to one of its employees, Plaintiff

Albert Lopez, pursuant to a statute from which employees like Lopez were excluded. This result cannot have been within the contemplation of Congress.

Another problem centers on the necessary maritime nature of claims properly within the LHWCA's ambit. The First Circuit has reviewed the relevant history of the LHWCA, Drake v. Raymark Industries, Inc., 772 F.2d 1007, 1012-1014 (1st Cir. 1985), and has concluded that "§ 905(b) implicitly requires that a tort be consummated within the admiralty jurisdiction to be cognizable under the statute." No argument has been advanced to persuade a contrary conclusion. The underlying tort sued upon by Plaintiffs Lopez is a product liability action under Washington law. This District Court concluded in Franklin v. Johns-Manville, Civil Cause No. C81-533M (Order Denying Plaintiff's Motion to Amend

Complaint, June 10, 1982) that there was no maritime nexus rendering the tort allegations cognizable in admiralty. The First Circuit concluded similarly in Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir.), cert. dismissed, 463 U.S. 1247, 104 S.Ct. 34, 77 L.Ed.2d 1454 (1983), as have all other circuits since then, including the Ninth, that have considered the question of the nexus to maritime activity of asbestos injury sustained by shipyard workers. See, Drake at 1015, and e.g., Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967 (9th Cir. 1983). Because Plaintiffs could not have brought the underlying cause of action in admiralty, it follows, perforce, that the manufacturers could not bring a derivative contribution/indemnity action.

c. Independent Duties.

In addition to the contribution/indemnity claims, which are essentially derivative of the Plaintiffs' cause of action, the manufacturers also contend that the Government owed noncontractual, independent duties of care directly to the manufacturers. These direct duties of care derive from the special, unique relationship between the Government and the manufacturers. This "special relationship" derives from the manufacturers and the Government working together in "a very real, if not legally cognizable, partnership -- in the development, design, manufacture, sale and procurement of asbestos-containing insulation products for use at federal and government-contract shipyards throughout the country." (Eagle-Picher memorandum in response at p. 26.) The duties of care arising from this "special relationship"

are said to include duties (1) not to require the production of unsafe products, (2) to share with the manufacturers the extensive knowledge the United States alone possessed regarding occupational exposure to asbestos dust, and (3) to use the manufacturers' products in the manner for which they were intended and in a reasonably safe and prudent way. (Id. at 27-28.)

A similar argument was made by the manufacturers in Drake. The defendants argued that the putative indemnitor owed a duty, independent of that owed its employees, not to use asbestos materials in a way that would make them unreasonably dangerous to the employees or others. Whether the duty was based on tort or contract or on an express or implied contract was not alleged. In dismissing the claim for failure to state a cause of action upon which relief could be granted, the Drake court

relied on the language of Judge Friendly in Zapico v Bucyrus-Erie Co., 579 F.2d 714 (2nd Cir. 1978). Judge Friendly, summarizing, said the Defendant was

> asking us to hold a user liable to a manufacturer for the former's negligent use of the latter's defective product. This we decline to do. Cf. 2A Larson [Workmen's Compensation Law], supra, at 402 [(1976)] ("But when a purchaser buys a product, does he make an implied contract with the manufacturer to use the goods in such a way as not to bring liability upon the manufacturer? This would be stretching the concept of contract out of all relation to reality").

Id. at 723.

In urging that noncontractual indemnity is available in the case at bar, Eagle-Picher is stretching legal concepts beyond their rational borders. To hold the Government liable to Raymark and Eagle-Picher for the Government's alleged negligent use of these manufacturers' alleged defective products is a convoluted attempt

to reshuffle liability. This attempt carries with it no logic or justice.

The "special relationship" underpinning to this argument must fail. This "special relationship" harkens back to the Government contract specifications defense where the manufacturers of asbestos containing products contended, inter alia, that the Government had extensive knowledge of asbestos hazards and exercised control over the design process. The validity of this defense was disposed of in the Court's "Order on Cross Motions for Summary Judgment" in Tefft v. A.C.&S., et al., C84-154M, October 11, 1984. In that case, and two others decided at the same time (Raines, C84-165M and Marry Rose, C84-168M), the manufacturers asserted the Government contract specification defense. The Court concluded:

> . . . that because the manufacturers had significant influence over the

> development of specifications, and because certain specifications were performance specifications which leave the details of manufacture to the manufacturer, the Defendants PCC, Fibreboard, and Raymark have failed to meet their burden on the element concerning who established the specifications. This element being dispositive of the defense, the Court need not address the remaining elements. Accordingly, summary judgment must be granted in favor of the Plaintiffs and denied as to the defendants.

Eagle-Picher did not assert the Government contract specifications defense in these cases, but in this case, it draws conclusions about the United States' domination of the design and manufacturing process in a self-serving way in a few paragraphs.

This argument for indemnity is also related to the earlier analysis under part 2.a. concerning Washington's abolition of indemnity. (Pages 153, supra.) Neither Raymark nor Eagle-Picher has demonstrated persuasively that the United States as a consumer of their products owed them a duty

such that the United States should indemnify the manufacturers in the amount of their damage settlements with Plaintiffs. Having reached this conclusion, it is unnecessary to reach the issue of whether under Washington law the manufacturers' right of contribution was waived by the settlements.

B. The Tucker Act (Contract Claims).

In addition to their FTCA based indemnity/contribution claims, Eagle-Picher and Raymark seek contractual indemnity from the United States pursuant to the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1402,[4] which confers jurisdiction on the district courts and Court of Claims for claims, not exceed-

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4 Act of March 3, 1887, ch. 359, 24 Stat. 505 (codified in scattered sections of 28 U.S.C.). The Act is named for its principal author and promoter. John Randolph Tucker of the House Committee on the Judiciary. Orme, Tucker Act Jurisdiction Over Bench of Trust Claims, B.Y.U. L. Rev. 855 (1979).

ing $10,000, against the United States, based on express or implied contract.

Eagle-Picher bases its claim on both written contracts for the Government's procurement of asbestos-containing products from Eagle-Picher and implied-in-fact contracts arising from the conduct of Eagle-Picher and the Government in the development, production, and distribution of asbestos-containing products. The breached duties under these contracts arise from the necessary conformance with the Government's mandatory specifications. By contractual enforcement of these mandatory specifications, the Government implied that it warranted them for their safety, among other things. Additionally, Eagle-Picher argues that the Government implicitly warranted that it would exercise due care in designating, specifying, and using Eagle-

Picher's asbestos-containing insulation products.

Raymark, like Eagle-Picher similarly contends (1) that the Government made implied warranties that it would use due care in designing, specifying, and overseeing the use of asbestos products at Puget Sound Naval Shipyard, and (2) that the Government implicitly warranted its mandatory specifications for their accuracy, feasibility, and safety

The Government contends that the manufacturers are not entitled to contractual indemnity under the Tucker Act because the Anti-Deficiency Act, 31 U.S.C. § 1341, prohibits Government employees from committing the United States to a "contract or obligation for the payment of money before an appropriation is made, unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). Since express indemnification agreements are

prohibited, implied agreements must also be prohibited, and since there has been no Congressional appropriation for the agreements alleged, and since one who deals with an agent of the Government is charged with knowing the limits of the agent's authority, the claims based on an implied contractual duty or agreement to indemnify must be dismissed.

Alternatively, the Government argues that even if the manufacturers' claims were not barred by the Anti-Deficiency Act, Tucker Act claims are limited to express or implied-in-fact contracts, not those implied-in-law.

1. The Antideficiency Act.

Because the Antideficiency Act is dispositive when applied to the Tucker Act claims herein, its provisions should be considered first. The Antideficiency Act,

U.S.C. § 1341, provides in pertinent part as follows:

> (a)(1) An officer or employee of the United States Government or of the District of Columbia government may not --
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341(a)(1). The obvious purpose of the statute is to prohibit anyone from obligating the Government in excess of the dollars appropriated by Congress. Solar Turbines International v. United States, 3 Cl. Ct. 489 (1983).

An Agreement by the Government to indemnify a product seller for future tort liability that the seller may incur as a result of a government employee's use of the product would create a future obliga-

tion of unknown magnitude. While the amount of money needed to purchase the product could be readily computed and appropriated, the amount needed to cover such a contingency as future tort liability would be unknown. Without extra money being appropriated to cover the contingency, it would constitute a deficiency which would violate the Antideficiency Act. In In re All Asbestos Cases, the Court noted that

> The Comptroller General consistently has taken the position that a government agent may not make any oral or written agreements to indemnify or "hold harmless" a contractor for future losses under a contract, absent specific authorization or appropriation. 35 Comp.Gen. 85 (1955); 33 Comp.Gen. 90 (1935); see also, California-Pacific Utilities Co. v. United States, 194 Ct. Cl. 703 (1971).

603 F. Supp. at 611. Exemplifying this conclusion in a thorough analysis is Matter of Assumption by Government of Contractor

Liability to Third Persons -- Reconsideration, 62 Comp. Gen. 361 (1983) (attached as Exhibit G to the Government's opening memorandum herein). There, the Comptroller General affirmed his earlier decision that a clause (desired by the Public Contract Law Section of the American Bar Association for use in cost reimbursement contracts) entitled, "Insurance-Liability to Third Persons," violates the Antideficiency Act. The Comptroller General took the view that the maximum amount of obligation could not be determined at the time a contract was signed and noted that the General Accounting Office (GAO) suggested that "no open-ended indemnities be promised without statutory authority to contract in advance of appropriations." Id. This Comptroller General opinion goes on to distinguish the rare situations where indemnification agreements were granted. None of those

unique situations applies to this case involving ordinary procurement contracts. The cases demonstrating this unbroken pattern stretch back beyond the time when the Comptroller General's Office existed. In 15 Comp. Dec. 405 (1909), the Secretary of the Treasury (the Comptroller General's predecessor) said:

> Under the [Antideficiency Act], no officer of the Government has a right to make a contract on its behalf involving the payment of an indefinite and uncertain sum, that may exceed the appropriation and which is not capable of definite ascertainment by the terms of the contract, but is wholly dependent upon the happening of some contingency, the consequences of which cannot be defined by the contract.

Id. at 6. (See Government's Exhibit G.)

Raymark argues that 3 U.S.C. § 1304(a) contradicts the Government's position concerning the Antideficiency Act. This argument is without merit. ". . . [T]he effect of § 1304(a) is simply that the Anti-Defi-

ciency Act does not bar payment of valid judgments against the United States. Thus, § 1304(a) is irrelevant to the issue of whether, in these cases, the legal predicate for judgment against the government exists." In re All Asbestos Cases, 603 F. Supp. at 612, n. 16.

The manufacturers have cited no cases that demonstrate with persuasive authority that the Antideficiency Act does not prohibit the Government from implicitly agreeing to indemnify manufacturers with whom it contracts for the manufacturers' liability versus a third party who used the product sold to the Government. In Terteling v. United States, 334 F.2d 250, 255, 167 Ct. Cl. 331 (1964), cited by the manufacturers, the United States contracted to furnish gravel pits without cost to the contractor. When the contractor had to defend itself in lawsuits brought by landowners of certain

lands from which gravel had been taken, the Court read the "without cost" provision to be unrestricted and to not prohibit reimbursement of litigation costs. These facts are unique and not at all applicable to the Government's relationship with these manufacturers. Moreover, the case involved the meaning of a term of the written contract between the parties.

Because the Antideficiency Act is a bar to the manufacturers' claims of an implied contract to indemnify, those claims, brought pursuant to Tucker Act jurisdiction, are dismissed.

2. Claims Actionable Under the Tucker Act.

Even if the Antideficiency Act were no bar to the manufacturers' contract based claims, further analysis of these asserted implied agreements to indemnify reveals yet another ground for their dismissal.

It is well-settled that Tucker Act jurisdiction extends only to claims arising out of express or implied-in-fact contracts, and that it does not reach contracts implied in law. In re All Maine Asbestos Litigation, 581 F. Supp. 963, 972 (D. Maine 1984). In re All Asbestos Cases, 603 F. Supp. 599, 610 (D. Hawaii 1984), each citing Merritt v. United States, 267 U.S. 338, 340-41 (1925), and Hatzlack Supply Co. v. United States, 444 U.S. 460, 100 S.Ct. 647, 62 L.Ed.2d 614 (1980).

> The distinction between a contract implied in fact, over which there is Tucker Act jurisdiction, and a contract implied in law, over which there is no Tucker Act jurisdiction, is well established. An implied-in-fact contract contains all the necessary elements of a binding agreement, but, since its express terms have not been reduced to writing or stated orally, its provisions must be inferred from the intent and course of conduct of the parties. See Restatement (Second) of Contracts §§ 4, 19 (1981); 1 A. Corbin, Corbin on Contracts § 19 (1963). An implied-in-law contract, a so-called quasi-

> contract, is not a contract at all, but a legal fiction which enables a court to fashion an equitable remedy to prevent the unjust enrichment of one party at the expense of another.

581 F. Supp. at 972.

In In re General Dynamics Asbestos Cases, 539 F. Supp. 1106, 1109-12 (D. Conn. 1982), the Court analyzed both whether there was an implied obligation as a matter of law or one as a matter of fact, i.e., one arising from the purchaser's affirmative conduct. As to whether an obligation arose as a matter of law, the Court quoted Santisteven v. Dow Chemical Co., 506 F.2d 1216 (9th Cir. 1974) where the plaintiff sued Dow on negligence and strict liability theories for injuries sustained while using an industrial caustic soda. Dow impleaded plaintiff's employer Kennecott Copper Corp. (KCC) alleging its failure to properly instruct its employer and to provide a safe work environment. Finding no express obli-

gation by KCC to Dow, the Court found no other basis to find that KCC owed an independent duty to Dow:

> Dow's liability arises because of a breach of a duty it owes to users of its products -- in this instance, a worker. Assumably, Kennecott has also breached a duty owed to the same worker by its negligence. Under Dow's theory, the whole burden of loss would be shifted whenever the employer was negligent in any way because the employer would have failed in its duty to extricate the third party from possible liability. Yet indemnity does not work in that way.

Id. at 1110.

Concluding that no implied obligation arose as a matter of law, the Court turned to the question of whether one could be fairly and reasonably inferred from affirmative conduct of the purchaser, other than the mere purchase of the product. The Court concluded that the purchase orders' references to Government-promulgated specifications -- an argument similar to that

made at bar -- were not sufficient to imply a contractual obligation to indemnify the third-party plaintiffs. The Court said it could not logically be contended

> that the requirements of the military specifications referred to in Electric Boat's purchase orders created in any way a risk to the plaintiffs which was not inherent in the ordinary and voluntary marketing of asbestos products.
>
> * * *
>
> To accept arguments of the third-party plaintiffs, for which no authority of relevance is cited, would truly turn "indemnity on its head," Santisteven v. Dow Chemical Co., 506 F.2d [1216] at 1219 [9th Cir. 1974], since the representation that a product is safe for its intended use normally flows from the manufacturer to the purchaser, not vice versa.

Id. at 1112.

In support of their position that, in effect, the specifications themselves create a basis for liability, the manufacturers cite Ordnance Research, Inc. v. United States, 609 F.2d 462, 221 Ct. Cl.

641 (1979) and United States v. Spearin, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918). The Government correctly argues that these cases are distinguishable in that damages or equitable contractual adjustments were awarded because government specifications or delays or other mistakes increased the cost of actual performance, and in such cases there is assumed to be governmental intention and commitment to pay for performance to complete the contract. These cases did not involve indemnification for tort judgments or settlements incurred by the contractors. Such liability is manifestly collateral to contractual performance. In In re All Maine Asbestos Litigation, 581 F. Supp. 963 (D. Maine 1984), the court concluded that "without any evidence of consent, this Court cannot find a contract implied in fact," id. at 973, and that the sale of

the asbestos products to the Government pursuant to specifications provided no basis for finding an implied warranty such that indemnification by the Government was necessary:

> It is well established that a vendor/vendee relationship creates no implied agreement by the buyer to indemnify the seller for injuries resulting from the use of the purchased product. In re General Dynamics Asbestos Products, 539 F. Supp. 1106, 1110-12 (D. Conn. 1982); Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 723 (2d Cir. 1978); White v. Johns-Manville Corp., 662 F.2d 243, 248 (4th Cir. 1981).

Id. at 981.

Other courts have drawn similar conclusions concerning the asserted, implied "reverse warranty." In White v. Johns-Manville Corp., 662 F.2d 243 (4th Cir. 1981), the Court said:

> This "reverse warranty" theory distorts the concepts of implied warranty "out of all relation to reality." 2A A. Larson, the Law of Workmen's Compensation § 76.44 at 14-402. There is no express warranty here, and no such warranty

> arises under the Virginia sales statute, see Va. Code §§ 8.2-314, 315, or simply from a vendor/vendee relationship. Jennings v. Franz Torwegge Machine Works, 347 F. Supp. 1288, 1289 (W.D. Va. 1972), see Santisteven v. Dow Chemical Co., 506 F.2d 1216, 1219 (9th Cir. 1974) (manufacturer's argument that purchaser has independent duty to avoid subjecting manufacturer to the risk of tort liability "turns indemnity on its head.").

Id. at 248. Accord, Colombo v. Johns-Manville Corp., 601 F. Supp. 1119, 1139-40 (E.D. Pa. 1984). Also, the quoted statement of Judge Friendly in Zapico applies with equal vigor here. (See p. 156, supra.)

Consequently, whether analyzed as barred by the Antideficiency Act or as not being a claim actionable under the Tucker Act, the manufacturers' contractually based claims are dismissed for failure to state claims for which relief can be granted.

CONCLUSION

Based on the foregoing discussion, all third-party claims are dismissed for failure to state claims on which relief can be granted. This result is not only consistent with precedent and traditional application of contract principles, but policy considerations underlying the relevant statutory provisions are also well served.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED the 19th day of May, 1986.

/s/ Walter T. McGovern
WALTER T. McGOVERN
Chief United States District Judge

m/16200-232

Supreme Court, U.S.
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Nos. 88-1382 and 88-1418

In the Supreme Court of the United States

OCTOBER TERM, 1988

EAGLE-PICHER INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

RAYMARK INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners, manufacturers of asbestos insulation products, were sued after shipyard workers were exposed to their products and contracted asbestos-related diseases. Petitioners then sought to pursue third-party tort and contract actions seeking contribution and indemnity from the United States, the employer of the shipyard workers and the owner of the vessels on which they worked. The questions presented are:

1. Whether the petitioners may pursue such third-party actions against the United States on a tort theory when the governing substantive law bars third-party tort actions in the absence of direct tort liability to the underlying plaintiffs, and the United States has no such liability to those plaintiffs.

2. Whether the court of appeals correctly concluded that petitioners' third-party actions against the United States could not be maintained under the Little Tucker Act on an implied reverse warranty theory.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1382

EAGLE-PICHER INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 88-1418

RAYMARK INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 858 F.2d 712. The opinion of the district court (Pet. App. 21a-45a) is reported at 649 F. Supp. 149.

JURISDICTION

The judgment of the court of appeals (Pet. App 46a-47a) was entered on September 28, 1988. A petition

[1] "Pet. App." citations are to the appendix to the petition in No. 88-1382.

for rehearing was denied on November 21, 1988 (Pet. App. 48a-49a). The petitions for writs of certiorari were filed on February 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Albert and Shirley Lopez were among the numerous plaintiffs who sued petitioners and other manufacturers of asbestos insulation products used at the United States' Puget Sound Naval Shipyard. They alleged that Mr. Lopez and others like him, who were civilian employees of the United States, had been harmed by exposure to the asbestos contained in petitioners' products.[2] The plaintiffs did not sue the United States: Since the shipyard workers were government employees, their exclusive remedy against the United States lay under the Federal Employees' Compensation Act (FECA), which provides no-fault compensation for work-related injury or death. 5 U.S.C. 8101, 8116(c). After the Lopezes settled their claim with petitioners, the petitioners, who had joined the United States as a third-party defendant, sought relief against it under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, and the Little Tucker Act, 28 U.S.C. 1346(a)(2).

The district court granted the government's motion to dismiss the third-party actions. Pet. App. 21a-45a. With

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[2] The shipyard workers included members of various trades. The plaintiffs alleged that the shipyard workers were exposed to asbestos dust when insulation containing asbestos was cut, which occurred both in workshops on land and aboard ships, and when old insulation was ripped out of ships. The plaintiffs claimed that petitioners and other manufacturers had failed to warn of the products' dangers or take other precautions to prevent injuries to the shipyard workers. Lopez was a pipe fitter, pipe coverer, and insulator at the Puget Sound Naval Shipyard from 1947 to 1984. Pet. App. 3a.

respect to petitioners' tort claims, the court first noted (*id.* at 23a) that the federal government is liable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. In the State of Washington, causes of action for tort indemnity have been abolished by statute, and contribution is available only against parties who are liable in tort to the underlying plaintiffs. Since private employers in Washington that participating in the state's workers' compensation program are immune from all tort actions by their employees, they are also immune from third-party actions. Pet. App. 29a-30a. Because the federal government, as a compensation-paying employer under the FECA, is similarly immune from suit by its employees, the district court concluded that the United States is immune from petitioners' third-party tort suits. *Id.* at 31a-32a.

Although that ruling may have been sufficient to dismiss all the third-party tort claims, the district court went on to reject the argument that the third-party actions could be maintained because Lopez could have proceeded with a "dual capacity" vessel owner claim against the United States under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(b). Under Section 905(b), as construed in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523 (1983), a private shipyard, while generally immune from tort actions brought by its employees, could be sued in tort by its employees for its negligence as "vessel owner," and therefore was subject to suits by third parties in that capacity.[3] The district court

[3] Congress amended Section 905(b) in 1984 to bar all actions by shipyard employees against their employers, and hence all third-party actions as well. Longshore and Harbor Workers' Compensation Act Amendment of 1984, Pub. L. No. 98-426, § 5(a)(1), 98 Stat. 1641. However, that amendment does not apply here because Congress gave

ruled that even if analogous private liability were tracked through the LHWCA rather than under state law, the claims against the United States could not survive. First, the court explained that since the FECA bars all direct actions, "an employer subject to the LHWCA * * * does not abide in circumstances similar to the United States." Pet. App. 32a. Second, the court noted, Section 903(i) "expressly excepts from coverage [under the LHWCA] employees of the United States or any of its agencies." Pet. App. 32a. Third, the court agreed with the First Circuit's conclusion "that '§ 905(b) implicitly requires that a tort be consummated within the admiralty jurisdiction to be cognizable under the statute.' " *Id.* at 33a (quoting *Drake* v. *Raymark Industries, Inc.*, 772 F.2d 1007, 1014 (1985), cert. denied, 476 U.S. 1126 (1986)). The court then concluded, as have all the courts of appeals to consider the question, that claims by shipyard workers injured by exposure to asbestos lack the requisite maritime nexus for admiralty jurisdiction. Pet. App. 33a. Accordingly, even apart from the FECA, Lopez could not have maintained an action against the United States under Section 905(b).[4]

The district court then turned from petitioners' tort theory to petitioners' implied reverse warranty claim. That

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the amendment prospective application only, and Lopez's exposure to asbestos occurred before 1984.

[4] The court also rejected petitioners' claim that, due to their "special relationship" with the government, the United States should be held liable to them in tort. It stated: "In urging that noncontractual indemnity is available in the case at bar, Eagle-Picher is stretching legal concepts beyond their rational borders. To hold the Government liable to Raymark and Eagle-Picher for the Government's alleged negligent use of these manufacturers' alleged defective products is a convoluted attempt to reshuffle liability. This attempt carries with it no logic or justice." Pet. App. 35a. The court further noted that Washington's statutory abolution of tort indemnity likewise compelled dismissal of this claim. *Id.* at 36a.

claim, brought under the Little Tucker Act, sought indemnification from the United States on the ground that, by buying petitioners' products, the government had impliedly warranted to use those products safely. The petitioners based their claim on the proposition that the asbestos insulation products sold to the Navy complied with various military specifications. The district court concluded that to accept petitioners' arguments " 'would truly turn "indemnity on its head," *Santisteven v. Dow Chemical Co.*, 506 F.2d [1216] at 1219 [9th Cir. 1974], since the representation that a product is safe for its intended use normally flows from the manufacturer to the purchaser, not vice versa.' " Pet. App. 43a (quoting *In re General Dynamics Asbestos Cases,* 539 F. Supp. 1106, 1112 (D. Conn. 1982)). Like the district court in the *In re All Maine Asbestos Litigation,* 581 F. Supp. 963 (D. Me. 1984), vacated in part on other grounds, 772 F.2d 1023 (1st Cir. 1985), cert. denied, 476 U.S. 1126 (1986), the district court here found it " 'well established that a vendor/vendee relationship creates no implied agreement by the buyer to indemnify the seller for injuries resulting from the use of the purchased product.' " Pet. App. 44a (quoting 581 F. Supp. at 981).[5]

2. The Federal Circuit affirmed. Pet. App. 1a-20a.[6] As to the tort claims, the court made clear that it was relying on Ninth Circuit law. *Id.* at 4a, 14a. It stated that the

[5] The district court also concluded that allowing petitioners' reverse implied warranty action to proceed would be contrary to the Anti-Deficiency Act, 31 U.S.C. 1341. The court determined that the Anti-Deficiency Act would prohibit an express indemnity agreement between the United States and a seller, and reasoned that no such implied agreement could be lawful. Pet. App. 38a-41a. The court of appeals did not rely on that approach. *Id.* at 9a.

[6] Petitioners had appealed to the Ninth Circuit, which transferred the case to the Federal Circuit because of the Little Tucker Act claim. See 28 U.S.C. 1295(a)(2); *United States* v. *Hohri,* 482 U.S. 64 (1987).

district court had "convincingly show[ed]" that, under Washington law, "an employer who carried appropriate workmen's compensation insurance would not be liable to indemnify third parties who were obliged to pay damages to the worker for having negligently caused or contributed to his injury." *Id.* at 19a. It also agreed with the district court and the First Circuit that Lopez would not have been able to bring an action against the United States in its capacity as vessel owner under the LHWCA, so that there was no basis for a third-party action under Section 905(b). Pet. App. 18a-19a.[7]

As to the contract claims, the court of appeals first noted that to establish Tucker Act jurisdiction a claimant must allege the violation either of the express terms of a contract or of a contract obligation implied in fact; an implied-in-law obligation does not state a claim under that Act. Pet. App. 5a. It also noted that "it is not now contended that the contracts or purchase orders contained any written warranties to sellers." *Ibid.* Thus, the question was whether an implied-in-fact obligation could be discerned. The court found that only where the "circumstances strongly supported a factual inference that a warranty was implied" had the courts found such an obligation (*id.* at 7a), and held that there were no such circumstances alleged here. To the contrary, the court of appeals agreed with the district court that "an implied warranty relating to the use by the buyer after delivery, and warranting it would not harm the seller is novel, and no reason is shown why anyone could have supposed at the date of sale by any inference from the circumstances" that such a warranty had been made. *Id.* at 8a-9a. The court's "appreciation of

[7] The court further concluded that petitioners could not bring suit "under traditional judge-made admiralty law" because admiralty jurisdiction is lacking in cases involving the construction or repair of vessels. Pet. App. 15a.

the bizarre and novel nature of the 'reverse warranty' here asserted, and its lack of support in the alleged facts or the court decisions," led it to conclude that "the Tucker Act does not provide means to enforce the alleged warranty here." *Id.* at 10a. In response to petitioners' arguments that an obligation should be implied because the government had provided specifications to manufacturers of asbestos insulation products, and the products were used for military purposes, the court noted that petitioners "do not know and cannot tell us whether the government specifications differed at all from those of private customers of Raymark and Eagle-Picher, or if they did, whether the difference related to the asbestos content of the material supplied." *Id.* at 7a-8a.

The court of appeals also rejected petitioners' attempt to hold the government liable on the theory that it had failed to disclose superior knowledge regarding the hazards of asbestos. See *American Ship Building Co.* v. *United States,* 654 F.2d 75 (Ct. Cl. 1981). The court stated that the government could "reasonably suppose Raymark and Eagle-Picher knew enough about asbestos and its perils not to need to learn more about it from the government." Pet. App. 11a-12a. Indeed, it expressed its "wonderment that anyone could have known more about the hazards of asbestos than those responsible companies who used it as raw material in the production of insulation." *Id.* at 10a.[8]

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[8] The court added that petitioners' effort to secure reimbursement from the United States here was "logically inconsistent" with the result in *Boyle* v. *United Technologies Corp.,* 108 S. Ct. 2510 (1988). In *Boyle,* this Court extended to government contractors the government's immunity from direct suit arising from injuries caused by defectively designed military products when "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known

ARGUMENT

1. All three courts of appeals to have considered the matter—the court below, the First Circuit in *In re All Maine Asbestos Litigation (PNS Cases),* 772 F.2d 1023 (1985), cert. denied, 476 U.S. 1126 (1986), and the Third Circuit in *Eagle-Picher Industries, Inc.* v. *United States,* 846 F.2d 888, cert. denied, 109 S. Ct. 490 (1988)—have concluded that manufacturers of asbestos products used at government shipyards may not maintain third-party tort actions against the United States. Each of the arguments petitioners now make in support of their contention that the tort question warrants review by this Court was made in one or the other (or both) of their prior petitions for writs of certiorari. This Court declined to review the decisions of the First and the Third Circuits and, since the Federal Circuit has now followed their lead, there is no reason for this Court to review its decision.

a. Like the First Circuit, the court of appeals here correctly concluded that "[n]egligence claims under [LHWCA] section 905(b)[] are those covered by federal maritime principles." Pet. App. 17a. The common law of admiralty recognized various actions available to shipyard workers, including a strict liability action for "unseaworthiness" by longshore workers injured on a vessel lying in navigable waters. See *Seas Shipping Co.* v. *Sieracki,* 328

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to the supplier but not to the United States." *Id.* at 2518. Thus, the court of appeals explained, if petitioners were as blameless as they assert, "there should be no damage awards on which to base claims for government indemnity or contribution." Pet. App. 13a. In any event, the court of appeals concluded, this "conflict of logic between the government contractor defense and the logic on which the third party alleged liability of the government here is based * * * is a factor counseling caution when we are asked to extend Tucker Act liability on new and novel grounds, only superficially based on the case law as known hitherto." *Ibid.*

U.S. 85 (1946). Congress enacted Section 905(b) in 1972 to replace that unseaworthiness action with a negligence action comparable to that available to longshore and harbor workers at common law. See, *e.g.*, *Drake*, 772 F.2d at 1013-1014. As the First and now the Federal Circuits have concluded, Congress did not intend that negligence action to extend beyond the scope of admiralty jurisdiction. Rather, like the unseaworthiness claim and the common law negligence claim, a plaintiff may bring suit under Section 905(b) only if the suit satisfies the jurisdictional requirements of admiralty law.[9] As the Third Circuit recognized, all the courts of appeals to have considered the matter have concluded "that asbestos-related claims by land-based ship workers bear no significant relationship to traditional maritime activity" (846 F.2d at 896), and thus are outside admiralty jurisdiction as set forth in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 268 (1972). Consequently, there is no basis for such claims under Section 905(b), and hence no basis for third-party actions such as those brought by petitioners.

Eagle-Picher argues (Pet. 12-15) that the conclusion that the maritime nexus test of *Executive Jet* must be satisfied in order to bring an action under Section 905(b) conflicts with decisions of the Fifth, Second, and Ninth Circuits. There is no conflict. With respect to the Fifth Circuit, as

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[9]See *Holland* v. *Sea-Land Service, Inc.*, 655 F.2d 556, 559 (4th Cir. 1981), cert. denied, 455 U.S. 919 (1982) (Section 905(b) did not "enlarge the traditional jurisdiction of admiralty over maritime torts"); *Christoff* v. *Bergeron Indus., Inc.*, 748 F.2d 297, 298 (5th Cir. 1984) (Section 905(b) "neither extended the boundaries of traditional admiralty jurisdiction nor converted ordinary tort claims against vessels into federal questions independent of admiralty"); *Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775, 787 n.9 (11th Cir. 1984) (Section 905(b), "rather than creating a new cause of action, merely preserves certain preexisting remedies to injured workers against third parties").

noted in our brief in opposition to the petitions filed seeking review of the First Circuit's decision, there may never have been a conflict in result between the First Circuit's decision and the Fifth Circuit's decision in *Hall* v. *Hvide Hull No. 3,* 746 F.2d 294, cert. denied, 474 U.S. 820 (1985). Since that time the Fifth Circuit, sitting en banc in *Richendollar* v. *Diamond M Drilling Co.,* 819 F.2d 124, 125-126, cert. denied, 108 S. Ct. 296 (1987), explicitly ruled (contrary to language in *Hall*) that the maritime nexus test must be met in order for a tort to be actionable under Section 905(b).[10] Thus, there is no longer even a colorable conflict with the Fifth Circuit. Indeed, the court below correctly cited the Fifth Circuit's decision in *Richendollar* in support of its conclusion that plaintiffs must establish a maritime nexus to bring suit under Section 905(b). Pet. App. 17a.

As also noted in our brief in opposition in the First Circuit case, there has never been a conflict with the Second Circuit's decision in *McCarthy* v. *The Bark Peking,* 716 F.2d 130 (1983), cert. denied, 465 U.S. 1078 (1984). There the Second Circuit had originally concluded that the plaintiff, who worked on a permanently anchored vessel used as a museum, was not eligible for compensation under the LHWCA and therefore could not bring an action under Section 905(b). After the ruling in *Director, Office of Workers' Compensation Program* v. *Perini North River Associates,* 459 U.S. 297 (1983), that it is not necessary to meet the maritime nexus test in order to be covered for

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[10] The en banc court stated: "We further hold that to be cognizable under § 905(b), a tort must occur on or in navigable waters * * * and there must be the traditional admiralty nexus. As a consequence, we now reject the suggestion made in *Hall,* 746 F.2d at 302-303, that the pre-*Executive Jet/Foremost Insurance* test for a maritime tort was codified in § 905(b) by the 1972 amendments to the Longshore and Harbor Workers' Act." 819 F.2d at 125-126.

workers' compensation purposes under 33 U.S.C. 902(3) (1982 & Supp. IV 1986), this Court remanded the *McCarthy* case for reconsideration. The Second Circuit ordered the case to go forward, but, as the First Circuit noted, it "was not asked, and did not consider whether § 905(b) jurisdiction required that the *Executive Jet* nexus test be satisfied." 772 F.2d at 1017 n.10.[11]

Similarly, there is no conflict with the Ninth Circuit decisions cited by Eagle-Picher (Pet. 14-15). Like the *McCarthy* case, *Cook* v. *Exxon Shipping Co.*, 762 F.2d 750 (9th Cir. 1985), cert. denied, 475 U.S. 1047 (1986), was a tort suit in which no issue concerning the maritime nexus of the alleged tortious behavior was raised. *Perkins* v. *Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982), which is cited by petitioners now and was cited by them in their petitions in the First Circuit case, did not concern a tort suit at all, but rather involved the question whether certain employees were covered by the LHWCA for purposes of receiving workers' compensation. It is well settled that "maritime employment" status under 33 U.S.C. 902(3) (1982 & Supp. IV 1986) for workers' compensation purposes is a broader concept than "maritime nexus" for determining admiralty jurisdiction over a tort action. See *Ramos* v. *Universal Dredging Corp.*, 653 F.2d 1353, 1359 (9th Cir. 1981); *Sample* v. *Johnson*, 771 F.2d 1335, 1344 (9th Cir. 1985). Accord, *Rohde* v. *Southeastern Drilling Co.*, 667 F.2d 1215, 1218-1219 (5th Cir. 1982); *Thibodaux*

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[11] The First Circuit further explained that "*Perini* was concerned solely with *compensation*, not with maritime tort jurisdiction, and these two boundaries have for a long time been quite distinct." *Drake*, 772 F.2d at 1018. Thus, contrary to Raymark's contention (Pet. 20-24), there is no conflict between this Court's decision in *Perini* and the conclusion that a tort plaintiff under Section 905(b) must establish a maritime nexus.

v. *Atlantic Richfield Co.*, 580 F.2d 841, 846 n. 14 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979).[12]

b. The alternative basis for dismissal of the tort claims adopted by the district court—that the United States' immunity to direct suit is a circumstance mandating dismissal when private parties who are immune to direct suit are insulated from third-party tort liability—is also correct. The Third Circuit adopted that argument in its *Eagle-Picher* decision (846 F.2d at 891-895), and both the First Circuit in the *All Maine Asbestos Litigation* (772 F.2d at 1028-1029) and the court below (Pet. App. 19a) commented favorably on it; no court of appeals has rejected that approach. Petitioners mistakenly argue that Section 8116(c) of the FECA (which makes clear that federal employees may not sue the United States[13]), and Section 903(b) of the LHWCA (which excepts federal employees from that Act) should not be taken into account in making the FTCA-mandated determination whether "a private individual under like circumstances" (28 U.S.C. 2674) would be liable. In petitioners' view, those bars to direct government liability are irrelevant and the United States should be analogized to a private shipyard owner without such statutory protections. But the FTCA refers to the liability of private parties "under like circumstances," and immunity to direct suit by the underlying plaintiff is a circumstance that may not be ignored. See, *e.g.*, *Eagle-Picher Industries* v. *United States*, 846 F.2d at 890.

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[12] Thus, the Federal Circuit's prediction of how the Ninth Circuit would have ruled here was correct. Moreover, the Ninth Circuit has granted interlocutory review of the Hawaii District Court's ruling in *In re All Asbestos Cases*, 603 F. Supp. 599 (1984), petition granted, No. 89-15329 (Mar. 10, 1989), and shortly will consider whether asbestos workers may maintain suits under Section 905(b).

[13] See *Johansen* v. *United States*, 343 U.S 427, 436-440 (1952); *Patterson* v. *United States*, 359 U.S. 495, 496 (1959).

Petitioners' argument that this approach is inconsistent with this Court's decision in *Lockheed Aircraft Corp.* v. *United States,* 460 U.S. 190 (1983)—an argument made in the unsuccessful petitions seeking review of the First and Third Circuit decisions—is without merit. *Lockheed* simply held that the FECA *itself* does not bar third-party tort actions arising out of injuries to federal employees. The Court explained that "the governing substantive law" would determine whether the government's immunity from direct suit would result in dismissal of FTCA third-party tort actions based on underlying suits by FECA-covered plaintiffs. 460 U.S. at 199. Thus, where the governing substantive law permits third-party tort suits against those parties who are immune to direct suits by the underlying plaintiffs, third-party FTCA suits may proceed. See, *e.g., Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597 (1963) (in a case arising out of a maritime collision under the old divided damages rule, contribution against the United States would be permitted because immunity to direct suit was irrelevant to such cases); *Doyle* v. *Rhodes,* 101 Ill.2d 1, 461 N.E.2d 382 (1984) (under Illinois law, immunity of employer from direct suit does not immunize it from third-party tort suits). But both the LHWCA and Washington law—the governing substantive law here—preclude third-party tort suits against those immune from direct suits.[14] Therefore, third-party FTCA

[14] The district court explained (Pet. App. 26a-30a) that, under Washington law, neither employees nor third parties may maintain tort actions against employers. Similarly, in the absence of a dual capacity suit, an LHWCA employer may not be held liable to an employee (see, *e.g., Pichoff* v. *Bisso Towboat Co.,* 748 F.2d 300 (6th Cir. 1984)) or a third party (see, *e.g., Drake,* 772 F.2d at 1019-1022; *Ketchum* v. *Gulf Oil Corp.,* 798 F.2d 159, 161-163 (5th Cir. 1986); *Graco, Inc.* v. *Colberg, Inc.,* 162 Cal. App. 3d 322, 330-335, 208 Cal. Rptr. 461, 470, 473 (1984), cert. denied, 474 U.S. 820 (1985)).

claims based on injuries to federal employees—who are denied a direct cause of action in tort against the United States—must be dismissed.[15]

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[15] This analysis is identical to that made by the Ninth Circuit in *United Airlines, Inc.* v. *Wiener,* 335 F.2d 379, 403-404, cert. dismissed, 379 U.S. 951 (1964). The court of appeals there, anticipating the approach set forth in *Lockheed,* ruled that an airline could not recover tort indemnification from the United States for payments made by the airline to government employee plaintiffs, on the ground that the applicable state law barred recovery against those not liable in tort to the underlying plaintiffs. See *Lockheed,* 460 U.S. at 193 n.3 and 199.

Similarly, in *LaBarge* v. *Mariposa County,* 798 F.2d 364, 367 (9th Cir. 1986), cert. denied, 481 U.S. 1014 (1987), and *Bell Helicopters* v. *United States,* 833 F.2d 1375, 1378 (9th Cir. 1987)—cases relied upon by Eagle-Picher in its petition in the Third Circuit case—the court affirmed dismissals of third-party tort actions against the United States where the government's all-encompassing immunity from *direct* suit was mirrored almost perfectly in the immunity of a private employer under the state workers' compensation bar. While those two cases did not involve the question of what happens when the privately-applicable workers' compensation immunity to direct suit is *not* all-encompassing (as would be the case under the LHWCA if a Section 905(b) suit were available against the employer), the Ninth Circuit recognized that the basic policy of the governing substantive law must control. The FTCA does not instruct a court to disregard immunities uniquely applicable to the United States on the ground that no such immunity could apply to a private party. In *LaBarge*, the court stated: "[T]he statutory language [of the FTCA] refers not to private persons under "the same circumstances," but to those under *similar* circumstances. * * * Because the federal government could never be exactly like a private actor, a court's job in applying the standard [for liability under the FTCA] is to find the most reasonable analogy." 798 F.2d at 367. Virtually identical language is found in *Bell*, 833 F.2d at 1378. Accord, *General Electric Co.* v. *United States,* 813 F.2d 1273, 1275 n.1 (4th Cir. 1987), vacated and remanded on other grounds, 108 S. Ct. 743 (1988) (noting that the FTCA "uses the term 'like circumstances,' rather than 'the same' or 'identical,' circumstances").

c. Petitioner Raymark contends (Pet. 14-18) that the court of appeals erred in affirming the district court's dismissal of its claims for tort indemnification on the basis of Washington state law. Questions of state law do not ordinarily warrant review in this Court (see, *e.g.*, *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979)) and, in any event, Raymark misstates the law of Washington. Washington's 1981 Tort Reform Act explicitly abolished the right of tort indemnity in all cases where trial on the underlying claims had not taken place by July 26, 1981. Wash. Rev. Code Ann. §§ 4.22.040(3), 4.22.920(2)(1988). Since no trial in the instant case was held before that date, there can be no tort indemnity claim. Thus, Raymark's reliance (Pet. 16) on two 1978 state cases—decided three years before the legislature changed the law—is misplaced. Raymark's further reliance on *Glass* v. *Stahl Specialty Co.*, 97 Wash. 2d 880, 885, 652 P.2d 948 (1982), is likewise without merit. There, the Washington Supreme Court, interpreting the Tort Reform Act, made clear that an employer's insulation from third-party liability could be circumvented only by "agreements" between the employer and the putative indemnitee and that "any intent to provide for indemnification must be clearly expressed in the agreement." 97 Wash. 2d at 885-886, 652 P.2d at 951; see Pet. App. 28a. No allegation was made here of such an express agreement, and even if such an allegation had been made, it would have been a claim in contract and thus would be actionable, if at all, only under the Tucker Act.

2. With respect to the third-party contract claim, the court below was the first court of appeals to address petitioners' implied reverse warranty theory. Accordingly, there is no disagreement in the circuits on that issue either. Moreover, the district courts have uniformly rejected such Little Tucker Act claims. See *In re All Maine Asbestos*

Litigation, 581 F. Supp. 963, 972-974, 980-981 (D. Me. 1984), aff'd, 854 F.2d 1328 (Fed. Cir. 1988); *Colombo* v. *Johns-Manville Corp.*, 601 F. Supp. 1119, 1139-1140 (E.D. Pa. 1984); *In re All Asbestos Cases,* 603 F. Supp. 599, 609-612 (D. Haw. 1984). Accordingly, there is no warrant for review of that claim.

Petitioners assert that the court of appeals based its decision on factual assumptions not warranted by the record. See Eagle-Picher Pet. 18-23; Raymark Pet. 24-25. Even apart from the rule that factual questions do not call for review by this Court, petitioners' arguments ignore the basic thrust of the court of appeals' decision. That decision was based not simply on what petitioners alleged, but also on what petitioners did not—and presumably could not, in good faith—allege.

In essence, petitioners claim that the United States impliedly agreed to indemnify them for any tort liability they might incur as a result of federal employees' exposure to the asbestos-containing products they produced in accordance with military specifications. As the courts below stated, however, such implied reverse warranty claims find little support in precedent.[16] There could be a plausible basis for such a claim only upon an allegation that the military specifications differed in a pertinent respect from products that petitioners had produced for its private commercial customers. Absent a showing that the specifications so differed, the courts would have no basis for inferring that the government, unlike other purchasers, had warranted to reimburse petitioners for their own tort

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[16] The court below noted (Pet. App. 8a) that "[e]ven in a 'reverse warranty' claim * * * against a private company where the concept of implied warranty is not confined to implied-in-fact cases, it has been held the alleged warranty cannot be implied. *White* v. *Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981)."

liability based on defects in their products. But petitioners made no such claim.[17]

Moreover, as the court below recognized (Pet. App. 12a-13a), petitioners' implied reverse warranty claim is inconsistent with the military contractor defense as set out in *Boyle* v. *United Technologies Corp.*, 108 S. Ct. 2510, 2518 (1988). That defense allows a contractor that merely followed precise government specifications and warned the government of any dangers known to it, but not to the government, to avoid liability. In *Boyle*, the Court found that the defense could be invoked because "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function" within the meaning of 28 U.S.C. 2680(a), and Congress intended to immunize the United States from tort liability for making such design decisions. 108 S. Ct. at 2517. See *Gordon* v. *Lykes Bros. Steamship Co.*, 835 F.2d 96, 100 (5th Cir.), cert. denied, 109 S. Ct. 73 (1988) (holding the government's decision to promulgate specifications requiring the use of asbestos on ships to be protected by the discretionary function exception). Thus, the Court recognized that Congress intended to insulate military product design decisions from judicial second-guessing by way of tort suits against the United States *or* against contractors following government orders. If, as

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[17] Thus, Eagle-Picher's heavy reliance (Pet. 18-21) on the court of appeals' statement that the military specifications for its products were performance specifications misses the mark. The dispositive factor in the court of appeals' analysis was the simple matter that petitioners were not able to assert that the products it sold to the United States were in any relevant respect different from those sold to their private commercial customers. Since the specifications were not alleged to have been different in any significant respect from those sold commercially, it is irrelevant whether they were design or performance specifications.

petitioners claim, they were asked to sell the government products with which they were not familiar, and if the government is the truly culpable party, petitioners would not be liable to the underlying plaintiffs (as a result of the military contractor defense), and there would be no basis for contribution or indemnity on any theory.[18]

Finally, a judgment against the United States on an implied reverse warranty theory would be contrary to Congress's intent, embodied in the discretionary function exception, to immunize the United States from tort liability for design decisions involving military products. Cf. *McKay* v. *Rockwell International Corp.*, 704 F.2d 444, 449 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[18] Like the court below (Pet. App. 13a), we do not wish to be understood as arguing that there is merit to petitioners' claim in the nationwide asbestos litigation (see, *e.g.*, *In re Alameda Complex Asbestos Litigation*, 251 Cal. Rptr. 805, 809-810 (Cal. App. 1988)) that they are, in fact, protected from liability to the underlying plaintiffs by the military contractor defense.

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